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REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO SEPTEMBER 19, 1916, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CXCVIII
A. D. 1917.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, APRIL 17, 1916.
FOURTH DISTRICT, APRIL 17, 1916.

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THE PUBLISHERS' EDITORIAL STAFF

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1917

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MAR 28 1917

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO SEPTEMBER 19, 1916.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.
Second District—WILLIAM M. FAHMER.....Vandalia.
Third District—FRANK K. DUNN.....Charleston.
Fourth District—GEORGE A. COOKE.....Aledo.
Fifth District—CHARLES C. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER, Justice, Michigan Blvd. Bldg., Chicago.

FIRST BRANCH*

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN P. MCGOORTY, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

SECOND BRANCH**

JOHN M. O'CONNOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

CLARENCE N. GOODWIN, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

EDGAR ELDRIDGE, Presiding Justice, Ottawa.

EMERY C. GRAVES, Justice, Geneseo.

GEORGE W. THOMPSON, Justice, Galesburg.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. § 2981.

** Established under act of June 6, 1911, J. & A. § 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.

JAMES C. McBRIDE, Justice, Taylorville.

FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

DEWITT T. HAETWELL, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: J. C. EAGLETON, Robinson.

JULIUS C. KERN, Carmi.

CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.

JAMES C. McBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermillion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.

WALTER BREWER, Toledo.

AUGUSTUS A. PARTLOW, Danville.

* Laws 1897, 188, J. & A. § 2070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: WILLIAM T. CHURCH, Aledo.
FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.
JAMES S. BAUME, Galena.
OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.
DUANE J. CARNES, Sycamore.
MAZZINI SLUSSER, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—Frank J. Walsh, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—August W. Miller, County Building, Chicago.

JUDGES.

RICHARD S. TUTHILL,
JESSE A. BALDWIN,
ROBERT E. CROWE,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,
JESSE HOLDOM,
VICTOR P. ARNOLD,
DAVID M. BROTHERS,
CHAS. M. THOMSON,

DAVID F. MATCHETT,
JOHN GIBBONS,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOERTY,
FREDERICK A. SMITH,
CHARLES M. WALKER,
GEO. F. BARRETT,
THOMAS TAYLOR, JR.,
OSCAR M. TORRISON.

SUPERIOR COURT.

CLERK—JOHN KJELLANDER, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
JOSEPH SABATH,
JOSEPH B. DAVID,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
JOHN J. SULLIVAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

W. C. FLANNIGAN, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge.

LOBAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge.

A. C. SHIPLEY, Clerk.

THE CITY COURT OF CARBONDALE.

HERBERT A. HAYS, Judge.

DALLAS MEISENHEIMER, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. McEWEN, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

H. L. BROWNING,

W. M. VANDEVENTER,

Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.**WM. H. PARISH, JR., Judge.****HOMER WADE, Clerk.****THE CITY COURT OF HERRIN.****ROBERT T. COOK, Judge.****ANNA DALE, Clerk.****THE CITY COURT OF JOHNSTON CITY.****J. H. CLAYTON, Judge.****J. E. SULLINS, Clerk.****THE CITY COURT OF KEWANEE.****H. STERLING POMEROY, Judge.****CHARLES L. ROWLEY, Clerk.****THE CITY COURT OF LITCHFIELD.****DAN W. MADDOX, Judge.****LAURETTA SALZMAN, Clerk.****THE CITY COURT OF MACOMB.****JOSIE WESTFALL, Judge.****WM. B. MARTIN, Clerk.****THE CITY COURT OF MARION.****W. O. POTTER, Judge.****GEO. T. CARTER, Clerk.****THE CITY COURT OF MATTOON.****JOHN McNUTT, Judge.****THOMAS M. LITTLE, Clerk.****THE CITY COURT OF MOLINE.****G. O. DIETZ, Judge.****GEO. A. SCHRAEDER, Clerk.****THE CITY COURT OF PANA.****J. H. FORNOFF, Judge.****G. W. MARSLAND, Clerk.****THE CITY COURT OF SPRING VALLEY.****WILLIAM H. HAWTHORNE, Judge.****PETER ROLANDE, Clerk.****THE CITY COURT OF STERLING.****CARL E. SHELDON, Judge.****EARL L. HESS, Clerk.****THE CITY COURT OF WEST FRANKFORT.****H. R. DIAL, Judge.****PEARL BEATTIE, Clerk.****THE CITY COURT OF ZION CITY.****V. V. BARNES, Judge.****O. L. SPRECHER, Clerk.****(6) MUNICIPAL COURT OF CHICAGO.**

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A.
¶ 3313 *et seq.*

FRANK P. DANISCH, Clerk.**CHIEF JUSTICE,
HARRY OLSON.****ASSOCIATE JUDGES.****HARRY M. FISHER
EDWARD T. WADE
JOHN K. PRINDIVILLE
JOSEPH P. RAFFERTY
JOHN COURTNEY
JOHN RICHARDSON
JOHN A. MAHONEY
WILLIAM N. GEMMILL
FRANK H. GRAHAM
WELLS M. COOK
HUGH J. KEARNS****JOSEPH S. LABUY
JOHN R. NEWCOMER
JOHN R. CAVERLY
JOHN A. SWANSON
HUGH R. STEWART
HARRY P. DOLAN
JOHN S. HAAS
HOWARD HAYES
ARNOLD HEAP
BERNARD P. BARASA****SAMUEL H. TRUDE
LEO DOYLE
EDMUND K. JARECKI
CHARLES N. GOODNOW
DENNIS W. SULLIVAN
SHERIDAN E. FRY
JOHN STELK
JOSEPH Z. UHLIR
HOSEA W. WELLS.**

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermillion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. § 3259.

JUDGES	COUNTIES	COUNTY SEATS
LYMAN MCCARL.....	Adams.....	Quincy.
MILES F. GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Boone.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HOBNER, PRO. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. J. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNEY OVERBECK.....	Effingham.....	Effingham.
JEROME G. WILLS.....	Fayette.....	Vandalia.
M. L. MCQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
HOBERT S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
ARTHUR A. MILES.....	Hardin.....	Elizabethtown.
RUFUS S. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, PRO. J.....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Galesburg.
R. C. RICE.....	Knox.....	Yorkville.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

JUDGES	COUNTIES	COUNTY SEATS
ALBERT T. LARDIN, Pro. J.	La Salle	Ottawa.
OTTO W. LONGNECKER	Lawrence	Lawrenceville.
JOHN B. CRABTREE	Lee	Dixon.
B. R. THOMPSON	Livingston	Pontiac.
CHARLES J. GEHLBACH	Logan	Lincoln.
JOHN H. MCCOY	Macon	Decatur.
ANDREW J. DUGGAN	Macoupin	Carlinville.
H. B. EATON	Madison	Edwardsville.
JOSEPH P. STREUBER, Pro. J.	Madison	Edwardsville.
WILLIAM G. WILSON	Marion	Salem.
DANIEL H. GREGG	Marshall	Lacon.
JAMES A. MCCOMAS	Mason	Havana.
LANNES P. OAKES	Massac	Metropolis.
CHARLES I. IMES	McDonough	Macomb.
DAVID T. SMILEY	McHenry	Woodstock.
JAMES C. RILEY	McLean	Bloomington.
JESSE M. OTT	Menard	Petersburg.
F. L. CHURCH	Mercer	Aledo.
HENRY SCHNEIDER	Monroe	Waterloo.
J. T. MCDAVID	Montgomery	Hillsboro.
WM. E. THOMSON	Morgan	Jacksonville.
JOHN T. GRIDER	Moultrie	Sullivan.
FRANK E. REED	Ogle	Oregon.
CHESTER F. BARNETT	Peoria	Peoria.
WALTER A. CLINCH, Pro. J.	Peoria	Peoria.
LOUIS R. KELLY	Perry	Pinckneyville.
WM. A. DOSS	Platt	Monticello.
PAUL F. GROTE	Pike	Pittsfield.
BENJ. F. ANDERSON	Pope	Golconda.
FRED HOOD	Pulaski	Mound City.
IRVING E. BROADDUS	Putnam	Hennepin.
WM. M. SCHUWERK	Randolph	Chester.
ROBT. B. WITCHER	Richland	Olney.
NELS A. LARSON	Rock Island	Rock Island.
BENJ. S. BELL, Pro. J.	Rock Island	Rock Island.
CHAS. D. STILWELL	Saline	Harrisburg.
JOHN B. WEAVER	Sangamon	Springfield.
C. H. JENKINS, Pro. J.	Sangamon	Springfield.
JOHN C. WORK	Schuyler	Rushville.
F. C. FUNK	Scott	Winchester.
A. J. STEIDLEY	Shelby	Shelbyville.
FRANK THOMAS	Stark	Toulon.
JOSEPH B. MESSICK	St. Clair	Belleville.
FRANK PERRIN, Pro. J.	St. Clair	Belleville.
ROSCOE J. CARNAHAN	Stephenson	Freeport.
JAMES M. RAHN	Tazewell	Pekin.
MONROE C. CRAWFORD	Union	Jonesboro.
LAWRENCE T. ALLEN	Vermillion	Danville.
W. J. BOOKWALTER, Pro. J.	Vermillion	Danville.
W. S. WILLHITE	Wabash	Mt. Carmel.
L. E. MURPHY	Warren	Monmouth.
W. P. GREEN	Washington	Nashville.
J. V. HEIDINGER	Wayne	Fairfield.
J. M. ENDICOTT	White	Carmi.
WM. A. BLODGETT	Whiteside	Morrison.
GEORGE J. COWING	Will	Joliet.
JOHN B. FITHIAN, Pro. J.	Will	Joliet.
W. F. SLATER	Williamson	Marion.
LOUIS M. RECKHOW	Winnebago	Rockford.
ARTHUR C. FORT	Woodford	Eureka.

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1916.

**The People of the State of Illinois, Defendant in
Error, v. Daniel Donahoe, Plaintiff in Error.**

Gen. No. 21,209.

1. **CONSPIRACY, § 53***—*when question of intention and acting without reasonable grounds in prosecuting suit for jury.* The question whether defendant knowingly and corruptly conspired with others to bring a civil suit without reasonable grounds and to prosecute it on false evidence for the purpose of defaming another is for the jury.

2. **ATTORNEY AND CLIENT**,—*when attorney acting on information from client not immune from criminal prosecution.* The principle that an attorney at law has the right to speak and act on information furnished by his client, and may claim immunity in the exercise of such right, cannot be used as a shield against crime, since such an application or perversion of such right is not required or justified either by the lawyer's professional duty, the protection of the client's rights, or the reason for the privilege.

3. **ATTORNEY AND CLIENT**,—*when attorney who has wrongfully prosecuted suit not immune from criminal prosecution.* Where an action is brought with unlawful design and with intention if tried to prosecute it by false testimony, knowing that there was no foundation therefor, the mere fact that in bringing the action the functions of an attorney at law were exercised will not protect the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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attorney from the revelation of every word and act in pursuance of the design, especially where the suit is not brought in good faith, the supposed client merely lending the aid of his name and services to press for the benefit of others a false issue in which he had no personal interest and claimed no legal right, the relation of attorney and client not existing in reality in such case.

4. CONSPIRACY, § 49*—*when evidence of declarations or overt acts competent.* In actions for conspiracy, evidence either direct or circumstantial, or declarations or overt acts designed to effect the accomplishment of the conspiracy is competent.

5. CONSPIRACY, § 49*—*what evidence admissible on behalf of State against attorney who wrongfully prosecuted civil suit.* In an indictment against an attorney at law for conspiracy to bring and prosecute a civil suit without reasonable grounds and on false testimony, where there is prima facie proof that defendant took an active part in the conspiracy, the State is not limited to proof that the suit was brought and prosecuted, but may show every step taken in prosecuting such suit as a part of the means employed to consummate the conspiracy.

6. CONSPIRACY, § 49*—*what evidence competent as part of res gestæ.* In an indictment against an attorney at law for conspiracy to bring a civil suit and to prosecute it by false testimony, whatever was said or done to advance the cause to a successful issue is competent as part of the *res gestæ*.

7. CONSPIRACY, § 49*—*when evidence in civil suit admissible in criminal suit to show purpose of defendant in bringing suit.* In an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, evidence for the defense in the civil suit is relevant in the criminal suit to show the purposes actuating defendant in bringing the suit, since conducting a trial to verdict involves not only proof and evidence to support the charge but also resistance to attempts to defeat it, so that such evidence is competent in the criminal trial to characterize such resistance.

8. CONSPIRACY, § 49*—*when any part of trial in civil action admissible in criminal action to show attitude and motives of defendant in bringing suit.* In an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, any part of the trial of the civil suit is competent to characterize defendant's attitude, motives, intent and purpose in relation to the conspiracy, or to the means employed to carry it into effect, the events of the trial being in-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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separably connected with the means employed to carry the conspiracy to fruition, and the trial, as an entirety, being such a means.

9. CONSPIRACY, § 49*—*when depositions used in civil trial admissible in criminal trial against attorney for plaintiff in civil trial.* In an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, such suit charging one with having alienated the affections of and with having debauched and carnally known the wife of another, where there is evidence that defendant knew that there was no basis for the charge that such wife's affections had been alienated, depositions read in the civil trial showing that at the time such civil suit was brought such wife and her husband were living together amicably and affectionately are competent in the criminal trial, not as proof of the facts contained in the depositions, but as giving significance to defendant's acts, purposes and motives, the depositions being relevant in the criminal trial by defendant's efforts in the civil trial to induce the jury to disbelieve the depositions, and thus to thwart their effect, in which case it is immaterial that the depositions were introduced against defendant in the criminal trial without opportunity to cross-examine the deponents.

10. CONSPIRACY, § 49*—*when affidavits filed in civil trial admissible in criminal trial against attorney prosecuting civil trial.* In an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute the same on false testimony, affidavits filed in the civil trial in support of a motion to advance for speedy trial, and showing the falsity and unlawful purpose of the action and the reasons for their early exposure and defendant's exoneration, are competent in the criminal trial as giving color and significance to an opposing affidavit instigated by defendant and used in the civil trial to defeat the attempt to show the innocence of defendant therein thereby furthering an object of the conspiracy.

11. CONSPIRACY, § 49*—*when evidence of conversation of plaintiff in civil suit admissible in criminal trial against attorney for plaintiff in civil suit.* On an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it by false testimony, evidence of a conversation with plaintiff in the civil suit after the suit was begun, wherein such plaintiff admitted that the suit was groundless, is made material by evidence that defendant knew that the admission was true, although some parts of the conversation testified to were objectionable as being hearsay, such evidence being competent only as bearing on defendant's efforts to impeach its value in order to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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obtain a favorable verdict and thus accomplish the object of the conspiracy.

12. CONSPIRACY, § 49*—*when verdict in civil suit admissible in criminal action against attorney for plaintiff in civil suit.* On an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, a verdict in the civil suit finding the defendant therein not guilty is material to explain evidence introduced in such suit that immediately after such verdict was rendered defendant advised the flight and concealment of plaintiff in such suit, such fact being inconsistent with the institution or prosecution of such suit in good faith.

13. CONSPIRACY, § 49*—*when every legal incident of trial of civil case admissible in criminal case against attorney for plaintiff in civil case to show motives of attorney.* On an indictment against an attorney at law for conspiracy, where one of the main issues is whether a civil suit was knowingly brought and prosecuted by defendant without reasonable grounds and for unlawful purposes, every legal incident of the trial so set in motion is relevant in the criminal trial as throwing light on defendant's motives for his conduct both before and during such civil trial.

14. CONSPIRACY, § 54*—*when denial of motion to strike statement by one of State's witnesses not reversible error.* On an indictment against an attorney at law for conspiracy to bring a civil suit without grounds and to prosecute it on false testimony, the denial of a motion to strike a statement of one of the State's witnesses that he went to defendant's office "about the time Mr. Hines brought his one hundred thousand dollar suit against" defendant in the civil suit, held not reversible error.

15. CRIMINAL LAW, § 236*—*when remarks by State's Attorney not improper.* On an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, the remark of an Assistant State's Attorney in argument that defendant induced some one in the State's Attorney's office to furnish him with a transcript of evidence taken before the grand jury which defendant offered in his own behalf at the trial, held not to afford ground for serious misunderstanding by the jury, the objection to the remark being that the fact was misrepresented and not to the comment on the fact.

16. CRIMINAL LAW, § 236*—*when State's Attorney may comment on failure to call stenographer to verify statements in paper.* On an indictment for conspiracy, where defendant offered in evidence a statement taken down by a stenographer and sworn to, it is proper for the State's Attorney to comment in argument on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

fact that the stenographer was in court and was not called on to verify the statement, the fact being significant if the facts in the statement were true, and the witness if called being subject to cross-examination, while the paper was not.

17. CRIMINAL LAW, § 218*—*when State's Attorney not required to call all witnesses.* The State is not required to call all the witnesses alluded to in evidence on a criminal trial, if the State's Attorney doubts the integrity or veracity of such witnesses.

18. CONSPIRACY, § 51*—*when comment by State's Attorney on failure to call certain witnesses for defense proper.* On an indictment against an attorney at law for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, comment is proper by the State's Attorney in argument on the fact of defendant's failure to call certain witnesses shown by undenied evidence to have been in intimate relationship with him and to have acted as his agents in carrying out certain parts of the conspiracy, where it appears that such witnesses were in the control of defendant during the pendency of the civil trial and that defendant controlled some of them at a later date, it not appearing that defendant was unable to produce such witnesses.

19. CONSPIRACY, § 51*—*when State may comment on failure of defense to produce witnesses.* In both civil and criminal cases of conspiracy, it is proper to comment on the failure of witnesses shown to have aided in carrying out the conspiracy to testify, where it appears that defendant at one time controlled such witnesses, and where it does not appear that he could not have produced them at the trial.

20. CONSPIRACY, § 51*—*what does not constitute reference to failure of defendant to take stand in his own defense.* On an indictment for conspiracy, the allusion by the State's Attorney in argument to the fact that defendant failed to produce at the trial certain witnesses shown to have acted as defendant's agents in carrying out the conspiracy is not an infringement of section 6 of division 12 of the Criminal Code (J. & A. ¶ 4123), forbidding reference to the failure of defendant to take the stand in his own defense.

21. CONSPIRACY, § 51*—*when allusion by State as to failure to produce witnesses not objectionable as tending to shift burden of proof.* On an indictment for conspiracy, the allusion by the State's Attorney in argument to the fact that defendant failed to produce at the trial certain witnesses shown to have acted as his agents in carrying out the conspiracy is not objectionable as tending to shift the burden of proof.

22. CRIMINAL LAW, § 240*—*when State may comment on failure*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of defendant to contradict witnesses for State. The State's Attorney in a criminal case may properly comment on the fact that the testimony of witnesses for the prosecution, has not been contradicted, even though defendant alone is in a position to contradict or dispute such testimony.

23. CRIMINAL LAW, § 240*—*when State may comment on failure of defendant to contradict witnesses for State.* In a criminal case the State's Attorney may properly allude to defendant's failure to call witnesses other than defendant who could have contradicted or disputed the State's evidence, and who were in such intimate relationship with defendant as to justify the inference that he could and would have called such witnesses if the testimony for the prosecution had not been true.

24. CRIMINAL LAW, § 553*—*when improper reference by State in argument to acquitted codefendant harmless error.* On an indictment against an attorney at law and another for conspiracy to bring a civil suit without reasonable grounds and to prosecute it on false testimony, where the attorney's codefendant was acquitted, the reference by the State's Attorney in argument to the failure to call codefendant as a witness, was not harmful to the defendant attorney, even though not inadvertently made and corrected before objection.

25. CONSPIRACY, § 50*—*when legal presumptions and evidence as to good character of defendant not conclusive as to defendant's innocence:* On an indictment for conspiracy, legal presumptions and evidence of good character of defendant, although valuable as evidence, are not conclusive of defendant's innocence as against positive, undenied evidence of an incriminating nature not improbable of itself and capable of being denied if not true.

26. CONSPIRACY, § 53*—*when questions of whether legal presumptions and evidence create reasonable doubt as to guilt for jury.* On an indictment for conspiracy, the question whether legal presumptions and evidence of defendant's good character are sufficient to create a reasonable doubt of defendant's guilt as against undenied positive evidence of an incriminating nature, not improbable in itself and capable of being denied if not true, is for the jury.

On Rehearing.

CRIMINAL LAW, § 491*—*when rehearing denied on points not argued.* In the absence of exceptional circumstances or a showing that would materially affect the merits of the main controversy as to the guilt of plaintiff in error, or that manifestly a great injustice has been done, a rehearing of the case on points not before

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

argued or specifically called to the attention of the court should be denied.

Error to the Criminal Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 1, 1916. Rehearing denied and additional opinion filed March 31, 1916.

JAMES HARTNETT, for plaintiff in error.

MACLAY HOYNE, for defendant in error; HAYDEN N. BELL and MARVIN E. BARNHART, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

The indictment in this case charged a conspiracy between plaintiff in error, Donahoe, one Stiefel, one Aileen Heppner and persons unknown having among other objects the defamation of one Clarence S. Funk. The several objects charged in different counts were to be effected by bringing and prosecuting, if necessary, a civil suit by one John C. Henning against Funk, charging the latter with having debauched and carnally known Josephine Henning, the former's wife. That there was an indictable offense charged is not open to question.

The gist of the case as made out at the trial was that pursuant to such a conspiracy the suit was knowingly and corruptly planned, instituted and prosecuted without foundation and on false testimony to promote one or more of the various objects set forth in the indictment, which, so far as the questions here are concerned, need not be severally stated.

The specific points argued in plaintiff in error's brief are summarized under the contentions that there was (1) a denial of his privilege as an attorney; (2) admission of improper evidence; and (3) prejudicial remarks at the trial. Other contentions are made generally that he was denied constitutional rights and that the verdict and judgment are contrary to law, which are embraced in one or more of the foregoing points,

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and that the verdict is contrary to the evidence and should have been directed by the court. But it was obviously a case for the jury, and as no instructions are complained of, their verdict should stand unless there was reversible error in one or more of the matters specifically discussed.

First, as to the question of privilege. The contention in effect is that because Donahoe was acting as attorney for Henning in said civil suit none of the proceedings therein involving his declarations and acts was admissible against him. The basis of the contention is the generally recognized right of an attorney to speak and act upon information furnished by his client, and the immunity afforded him in the exercise of such right. It is the privilege he may invoke in such actions as libel and slander when based on his words or papers used in the course of judicial proceedings. The principle and its application are well recognized. But we are aware of no case where it has been invoked or allowed as a shield to crime. Neither fulfillment of the lawyer's professional duty, nor protection of his client's legal rights nor the reason for the privilege requires or justifies any such application or perversion of its use. If the suit against Funk was brought by plaintiff in error, knowing there was no foundation therefor and intending if tried to prosecute it on false testimony, the mere fact that in so doing he exercised the offices of an attorney would not protect him from the revelation of every word and act in pursuance of the unlawful design. Besides, there was much undisputed evidence that the civil suit was not brought in good faith and that the relationship of attorney and client, on which the privilege invoked depended, did not in reality exist between Donahoe and Henning but that the latter was induced by the former merely to lend the use of his name and services to press for the benefit of others a false issue in which he had no personal interest and claimed no legal right.

Second. As to claim of improper evidence. Part of the evidence claimed to be inadmissible was that of proceedings had and testimony heard in the civil suit, which were received as proof both of means employed to carry out the conspiracy and to show one or more of its specific objects. If they tended to show either they were unquestionably competent. The law pertaining to conspiracy is too well established and known to require citation of authorities as to the materiality of any such evidence, whether direct or circumstantial, or declarations or overt acts designed to effect its accomplishment.

There being *prima facie* proof of an active part by plaintiff in error in a conspiracy to bring and prosecute such suit without reasonable grounds and on false testimony, the people were not limited to proof of the mere fact that the suit was brought and prosecuted, but were entitled to show every step in its prosecution to its final result, as a part of the means employed to consummate the conspiracy. Whatever was said or done therein to advance the cause to a successful issue was a part of the *res gestæ*. Conducting the trial to a verdict involved not merely proof and argument to support the charge but resistance to every effort made to defeat it, and thus made evidence for the defense in that suit relevant in this to characterize such resistance and the purposes beneath it. Every step taken, every fact relied on, every word used in the trial became so inextricably connected with its purposes and the conspiracy charged, as to be inseparable from the conspiracy or the means exercised to carry it to fruition. The trial as an entirety constituted such means, and hence any part of it was admissible to characterize plaintiff in error's attitude, motives, intent and purposes as related to the conspiracy or the means employed to carry it into effect.

The parts designated and argued as erroneously admitted in evidence consist of (1) depositions read by

the defense; (2) affidavits in support of defendant's motion to advance the cause for trial; and (3) testimony of defendant's witness Fortner. None of them was admitted to prove the alleged facts they contained, but as a part of the *res gestæ* as well as to give significance and interpretation to other related proceedings in the civil suit unquestionably competent to show the conspiracy or means employed to effect it.

The depositions showed, in substance, that Henning and his wife were living amicably and affectionately together at the very time the suit was commenced. Donahoe's legal firm had notice of and participated in the taking of them. There having been evidence in the instant case that Donahoe knew from the beginning that there was no basis for the charge that Mrs. Henning's affections were alienated, any efforts he made in the civil suit to induce the jury to believe to the contrary and thus to thwart the effect of the depositions rendered them competent to give significance to his acts, purposes and motives. The objection that they were introduced against plaintiff in error without opportunity to cross-examine the deponents was based upon an utter misconception of their relevancy as above explained.

The affidavits objected to set up, in substance, the falsity and unlawful purposes of the civil suit and reasons for their early exposure and Funk's speedy exoneration. They were material to give color and significance to Henning's opposing affidavit which appeared to have been instigated and used to defeat defendant's attempt to show his innocence and thus to further an object of the conspiracy.

Fortner's testimony set forth an interview with Henning after the suit was begun in which he admitted it was groundless. Donahoe's argument to the jury sought to impeach its effect. The introduction of evidence that he knew that Henning's admission was true rendered its materiality obvious. The specific objec-

tion that some parts of the interview were hearsay ignores the ground of its materiality, namely, its bearing on Donahoe's efforts to impeach its value in order to obtain a favorable verdict.

Some documents pertaining to the civil proceedings, like the clerk's wrappers, for instance, may have been incompetent as not part of the *res gestæ*, but were seemingly harmless in character. But as no other parts of such proceedings, than those already considered, are specifically discussed in plaintiff in error's brief, we shall not review them in detail, except to say of the verdict finding Funk not guilty, that if not a part of the *res gestæ*, it was material to explain evidence that immediately after its rendition Donahoe urged Henning's flight and concealment, a fact inconsistent with the institution or prosecution of the suit in good faith. It may be said generally, however, that as one of the main issues presented in the instant case was whether the civil suit was knowingly brought and prosecuted by plaintiff in error without reasonable grounds and for unlawful purposes, every legal incident of the trial so set in motion would seem to be not only a part of the *res gestæ* but relevant as throwing light on the motives for his conduct both before and during the trial.

It is also urged as error that the court did not strike out a statement of the People's witness Deuter that he went to Donahoe's office about "the time Mr. Hines brought his one hundred thousand dollar suit against Mr. Funk." If error we do not think it such as to require a reversal.

Third. As to prejudicial remarks. The Assistant State's Attorney in his argument to the jury commented on testimony to the effect that Donahoe had induced some one in the State's Attorney's office to furnish him a transcript of Mrs. Henning's testimony before the grand jury that was offered in evidence in his behalf. The objection thereto was not to the right

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to comment on the circumstance but that the State's Attorney wilfully misrepresented it. There does not appear to have been ground for any serious misunderstanding on the part of the jury.

Comment was also made on the failure of the defense to call certain persons as witnesses shown by the State's evidence to have acted as agents for Donahoe in carrying out certain parts of the conspiracy. None of them was named as defendant in the indictment. Each was shown, without any attempt at denial, to have carried communications or money from Donahoe to either Mr. or Mrs. Henning, or to have aided in keeping them in concealment while the civil suit was pending or otherwise in carrying out the conspiracy. If the testimony of Henning and his wife against Donahoe was not true, a great part of it could have been denied by such persons. And if what was offered by the defense as her statement to Donahoe taken down by and sworn to before Donahoe's office stenographer, Lambie, who was present in court in Donahoe's employ, was true, it was significant and a proper subject for allusion that he was not called to verify it. As the State's Attorney pertinently said, he could not cross-examine the paper but he could the witness. The People, though not required to call the parties so alluded to (*Carle v. People*, 200 Ill. 494), made proof of their inability to produce any of them except Lambie. After undenied proof of their intimate relationship with Donahoe, and his ability to control their services during the pendency of the suit, and later as to some, we see no error in the absence of any proof that he could not produce them, in alluding to their failure to testify. Such comment under such circumstances is permissible in criminal as well as civil cases. (*People v. McGarry*, 136 Mich. 316; *Commonwealth v. McCabe*, 163 Mass. 98; 1 Greenleaf on Evidence, sec. 195 b.) The allusion was no infringement of the statute which forbids reference to the failure of a de-

fendant in a criminal case to take the witness stand, nor tantamount to shifting the burden of proof. If as has been held by our Supreme Court the state's attorney has a right to comment on the fact that the testimony of witnesses for the prosecution has not been contradicted or disputed even though the defendant was the only person in a position to have disputed it (*People v. McMahon*, 244 Ill. 45; *Bradshaw v. People*, 153 Ill. 156), we fail to see why he may not go further and point out persons other than the defendant, shown by the evidence to have been in such a position and to have had such intimate relationship with the defendant as to justify the inference that he could call them and would have done so, if the testimony for the prosecution was not true.

In discussing the failure of the defense to call witnesses present when a statement was sworn to by the witness Slavin, the assistant state's attorney mentioned Stiefel, who was a codefendant with Donahoe and acquitted. Before objection was made he corrected himself saying he meant "Ahern," one of the parties so present. There was no pretense that Donahoe was among those present on the occasion being discussed. The reference not being to his failure to testify or capable of such construction, it did not so far as he was concerned come within the inhibition of said statute. As it did no harm to Stiefel, who but for his acquittal might have complained of it, it is difficult to see how it did to Donahoe, to whom the allusion was not made.

We have carefully examined the record and plaintiff in error's argument and fail to find reversible error. His general legal propositions are unquestioned. But either their application is not apparent or their violation is not shown. No attempt at a direct denial of any specific incriminating facts was made. With the exception of a signed statement by the People's witness Slavin, and evidence bearing on

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its authentication, and a signed statement by Mrs. Henning, both of which so far as helpful to plaintiff in error were expressly repudiated, and a copy of the latter's testimony before the grand jury, plaintiff in error relied wholly upon legal presumptions and evidence of his previous good character. Valuable as both are, they are not conclusive as against positive undenied evidence of an incriminating nature not improbable in itself and capable of denial if not true. Whether they were sufficient to generate a reasonable doubt of guilt was for the jury to say, and their verdict and the judgment thereon should stand in the absence of reversible error.

Affirmed.

PER CURIAM. In the petition for rehearing plaintiff in error, evidently recognizing the settled practice of Appellate Courts to regard as waived assigned errors not argued, asks leave and proceeds to discuss points not specifically argued nor alluded to in his brief or oral argument. Nearly one hundred pages of the petition are devoted to a discussion of them. We had previously denied a motion to file a "supplemental brief" made after our opinion was rendered, and would be warranted in striking the petition from the files. To reconsider the case on grounds other than those relied on and discussed in plaintiff in error's brief and argument without giving an opportunity for reply, would be manifestly irregular and unjust; and to reopen the case, after decision thereof on points discussed, to consider assigned errors not argued nor apparently deemed of sufficient importance to bring to our attention when the case was before us for consideration, would not only be unusual but encourage procedure of a speculative character. In the absence of exceptional circumstances or a showing that the new matters would materially affect the merits of the main

controversy as to plaintiff in error's guilt or that there has manifestly been a great injustice done, a rehearing of the case on points not before argued or specifically brought to our attention would be unjustified. On the points considered in our opinion, which covered each and every one argued, the petition presents nothing new or controlling. As to other points, it cannot be entertained further than to say that the indictment, discussed therein for the first time, contains at least some good counts. But neither it, nor a single instruction, nor several rulings on evidence to a discussion of which the petition is mainly devoted, were alluded to in the brief.

Rehearing refused.

**J. H. Alsdurf, Administrator, Appellee, v. Big Four
Wilmington Coal Company, Appellant.**

Gen. No. 20,845. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 1, 1916.

Statement of the Case.

Action by J. H. Alsdurf, administrator of the estate of Martin Carra, deceased, plaintiff, against the Big Four Wilmington Coal Company, defendant, in the Superior Court of Cook county, to recover for the death of plaintiff's intestate as a result of defendant's alleged violation of the Miners' Act (J. & A. ¶ 7475 *et seq.*). From a judgment for plaintiff for \$4,000, defendant appeals.

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The action was brought for the benefit of the next of kin of intestate. The deceased was killed by a large stone falling on him while engaged as a coal miner in defendant's mine, and while sounding the roof of his working place. The specific acts of wrongful violation of the statute, charged in the declaration, are, in part, failure to have its mine examiner—

(a) inspect the working places of deceased and others before they were permitted to enter the mine on that day,

(b) observe whether there were any dangerous roofs,

(c) place a conspicuous mark thereat, as notice for all men to keep out,

(d) observe that the roof and walls of the room in which decedent was working were in a dangerous condition.

Also that by reason thereof, decedent entered the place in the performance of his duties, and while so engaged was killed.

The mine is known as a long wall mine. A long wall mine is one where all the coal is taken out and the roof supported by the brushing or rock taken down. In such a mine, the mining commences in the center, the face or working edge of the layer or seam of coal forming a circle gradually increasing in circumference as the coal is taken out. There were two hundred rooms in the mine and two miners worked in each room. The room in question was only three feet in height, being the height of the vein or seam of coal. The coal was dug out to a width of four feet underneath the rock or brush not taken down at the end of the roadway, the face of the brush being four feet from the face of the coal.

All of the witnesses agreed that the only means of ascertaining the safety of the roof was by placing one's hand lightly against it, at the same time tapping it with a bar, pick or other implement. If the roof was loose or dangerous it would give a hollow or dead

sound and the hand could feel it quiver; while if the roof was sound, or apparently safe, it would give back a ringing or bell like sound, and the hand would feel no quivering or shaking, and in this way it can always be determined whether or not the roof is safe.

The only witness to the accident was Frank Aragno, a partner or "buddy" of intestate, who worked with him. Remigo Sambon, who worked in an adjoining room, and John McNamara, a track layer, were with intestate shortly before the accident. Aragno testified that he saw the mark "23," the date of the month, on the "brush" above the entrance to their room, before they entered it, indicating that the mine examiner had examined the room and that it was safe, but saw no similar mark on the walls of the room. The evidence of the mine manager was that the mark "23" was on the "brush" (at the end of the roadway) and about six or seven feet from where the rock fell. The witness and intestate upon entering the room, about 7:30 a. m., before commencing work, sounded the roof with their picks. In the opinion of the witness the room was in good condition up to the time the stone fell. About 9:00 a. m., intestate and Aragno, Sambon and the latter's "buddy" took lunch in the roadway near by. Aragno testified that upon returning to their room, intestate sounded the roof with his pick at the place where the rock subsequently fell, which was immediately to the right of the roadway, and about five minutes thereafter returned to the same point and while again sounding that part of the roof the stone fell upon him.

Sambon testified that he and intestate entered the latter's room "the first thing" that morning and found a "squeeze," namely, where a portion of the roof or coal had fallen between his room and that of appellee's intestate. Sambon testified:

"Q. Had you seen him go in there that morning to the place where the rock fell on him? A. * * * Yes, sir. But he (intestate) looked—it was pretty

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bad. Then he came out and I saw the props * * *
he got the props down under it (the stone) * * *.
Well you see the props the first thing off in the morn-
ing,—he never sounded in the morning at all.”

He further testified that he saw intestate sound the roof with a pick that morning between nine and ten o'clock, and that the roof sounded good. Sambon testified, further, that the stone slipped, diagonally, about six inches towards the face of the coal before it fell. Aragno testified that the top of the stone was damp, smooth and slippery. The stone was seven feet long, three and one-half feet wide in the center, tapering to a point at the right side, and about one to two feet thick. One of defendant's expert witnesses, who examined the stone after it had fallen, testified that in such a mine a stone can change or break within a few minutes. He described a “slip” as a condition in the top of the stone which can be detected by sounding. Another expert witness, who testified in behalf of plaintiff, stated that if a stone is wet it can be ascertained by examination and the danger determined. Aragno testified in this regard: “It is harder to tell if it (the stone) is solid when it is wet.”

The mine examiner, John Thom, testified that he examined the roof of the room at about three o'clock on the morning of the accident, testing the roof with a pick, and that there was no loose stone nor dangerous condition. The examiner to get into the room had to pass through a space under the rock or brush three feet in height and four feet in width. On the face of the rock or brush, at the end of the roadway and above the said entrance, he inscribed the mark “23,” and did not place any danger mark on the walls of the room. The testimony of Sambon tended to show that it was customary to place the mark “on the face of the brush or some stone alongside.” Thom testified that he also examined the room after the stone fell and that at the time he made the examination before the acci-

dent, "there was nothing could have come there * * * except they * * * (Carra and his 'buddy') had dug the coal out, that the *coal was * * * still covering the place where the stone fell*, and * * * that before Carra could have gone in there, he would have had to take the coal down." On cross-examination he was asked: "So you didn't sound it (the roof) at the place where he was killed * * *?" Answer: "It was too tight * * * I sounded it after I got through, *where I could get my pick to sound it, where the man was killed.*"

Sambon testified: "Carra did not take down any coal that morning." Aragno testified that intestate, after lunch, was working under the place where the stone fell and "we had taken the coal out, where Martin was standing, the day before."

Plaintiff's witnesses and the mine manager testified regarding falls of coal at that time in other rooms, some of which were not in use. Presence of such falls of coal were denied by the mine examiner.

D. R. ANDERSON and JOHN A. STAGG, for appellant.

CHARLES CHENEY HYDE, CHARLES B. ELDER, IRA E. WESTBROOK and CHARLES H. WATSON, for appellee.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 258*—*when amendment of name of plaintiff does not constitute stating new cause of action.* In an action by a plaintiff as "Administrator of the Estate of Carra Martin," an amendment changing all the papers in the case so as to read "Administrator of the Estate of Martin Carra" does not state a new cause of action, the words in which the transposition was made being *descriptio personae*.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. PLEADING, § 474*—*when omission to change papers upon order of amendment cured after judgment.* In an action by a plaintiff as "Administrator of the Estate of Carra Martin" where the court ordered the amendment of all papers in the case so as to read "Administrator of the Estate of Martin Carra," it is immaterial after judgment that the *praecipe* and summons were not changed by interlineation subsequent to the amendment so as to conform thereto, the order of amendment being sufficient to support the verdict after judgment.

3. APPEAL AND ERROR, § 1544*—*when giving of instruction to find defendant guilty if plaintiff made out case as alleged in declaration harmless error.* Although the practice in actions based on negligence of giving instructions to find defendant guilty if plaintiff made out his case by a preponderance of the evidence as alleged in the declaration is not to be commended, yet such instructions are not reversibly erroneous where every count in the declaration contains allegations of the facts necessary to a recovery.

4. INSTRUCTIONS, § 159*—*when must be taken as a series.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of defendant's alleged wilful violation of the act, an instruction in effect that plaintiff might recover for death of which a wilful violation of the act by defendant was the proximate cause, regardless of whether such violation was charged in the declaration, is not erroneous where other instructions given for plaintiff state fully that plaintiff can recover only for violations of the act as charged in the declaration, since in such case instructions must be taken as a series.

5. MINES AND MINERALS, § 149*—*when not necessary for plaintiff to prove that intestate was directed to go to place where he was killed.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of defendant's alleged wilful violation of the act, it is not necessary to prove that intestate was specifically directed to go to the place where he was killed, where defendant does not contend that at the time of his death intestate was not acting within the scope of his employment.

6. MINES AND MINERALS, § 188*—*when instruction not erroneous as assuming roof of mine in dangerous condition.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of defendant's alleged wilful violation of the act, an instruction that "if the jury believed from the evidence that the roof of the room where plaintiff's decedent was killed was in a dangerous condition, and that said dangerous condition could have been ascertained by the mine examiner within twelve hours preceding the day aforesaid, and that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the defendant was guilty of the wilful omission alleged," *held* not objectionable as assuming that the roof was in a dangerous condition.

7. MINES AND MINERALS, § 191*—*when instruction not erroneous as placing duty upon defendant to inspect mine continuously for certain period before accident.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of defendant's alleged wilful violation of the act, an instruction that "if the jury believe * * * said dangerous condition could have been ascertained by the mine examiner *within twelve hours preceding the day aforesaid,*" *held* not erroneous as telling the jury that it was the duty of defendant to inspect all places in the mine for twelve hours continuously preceding the beginning of the day in question, the instruction clearly presenting the issue as to whether there was a dangerous condition which could have been discovered at any time prior to the commencement of the working day of plaintiff's intestate.

8. INSTRUCTIONS, § 151*—*when requested instructions covered by given instructions properly refused.* Requested instructions which are fully covered by other instructions given on behalf of the same party, are properly refused.

9. MINES AND MINERALS, § 182*—*when question as to examination of roof of mine by mine examiner for jury.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of the fall of a stone from the roof of the room where intestate was working when killed, the question whether the mine examiner examined such room as required by section 21 of such Act (J. & A. ¶ 7495) is a question for the jury.

10. MINES AND MINERALS, § 176*—*when evidence sufficient to establish that mine examiner could have ascertained dangerous condition of roof of mine.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of the fall of a large stone from the roof of the room where intestate was working when killed, where the evidence was conflicting as to whether the mine examiner inspected the room as required by section 21 of the Act (J. & A. ¶ 7495), evidence *held* to establish the fact that the mine examiner in the exercise of reasonable care would have discovered such a dangerous condition, if it existed.

11. MINES AND MINERALS, § 86*—*when operator of mine not relieved from duty of inspecting roof.* The fact that a miner is required by section 23 of the Miners' Act (J. & A. ¶ 7497) to sound and thoroughly examine the roof of his working place before com-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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mencing work does not relieve the operator from the duty imposed by section 21 of the same Act (J. & A. ¶ 7495) to inspect such roof.

12. MINES AND MINERALS, § 127*—*when miner not guilty of contributory negligence in working under dangerous roof.* A miner has the right to rely on the performance of the duty imposed on the mine examiner by section 21 of the Miners' Act (J. & A. ¶ 7495), and, in the absence of evidence of a mark in such working place indicating the opinion of the examiner that the roof was dangerous, cannot be held guilty of contributory negligence in working under a stone which later falls and kills him.

13. MINES AND MINERALS, § 84*—*what constitutes a wilful violation within Mining Act.* A wilful violation within the meaning of the Miners' Act (J. & A. ¶ 7475 *et seq.*), means a conscious violation.

14. MINES AND MINERALS, § 127*—*when miner entitled to benefit of superior knowledge of mine examiners.* Under the Miners' Act (J. & A. ¶ 7475 *et seq.*), a miner is entitled to the benefit of the superior knowledge and experience of those charged with the duty of discovering dangerous conditions in the mine.

15. MINES AND MINERALS, § 176*—*when evidence sufficient to establish that mine examiner could have discovered condition of stone in roof of mine within specified time.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of the fall of a large stone from the roof of the room where intestate was working in a long wall mine when killed, evidence held to show that the condition of the stone could have been discovered by examination at any time within twelve hours of its fall, although there was also evidence that in such a mine a stone can change or break within a few minutes.

16. MINES AND MINERALS, § 182*—*when question whether mine examiner could have discovered dangerous condition of roof for jury.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as a result of the fall of a large stone from the roof of the room where intestate was working when killed, the question whether the dangerous condition existed when the mine examiner inspected the room, and whether in the exercise of reasonable care such examiner should have discovered such condition, is for the determination of the jury on all the evidence.

17. MINES AND MINERALS, § 181*—*when question whether proximate cause of death of workman due to failure of mine examiner to use care to ascertain condition of roof for jury.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number

Schechtman v. Chicago Railways Co., 198 Ill. App. 23.

for the death of plaintiff's intestate as a result of the fall of a large stone from the roof of the room where intestate was working when killed, the question whether the proximate cause of intestate's death was the failure of the mine examiner to exercise reasonable care to discover such dangerous condition when he made his examination is for the determination of the jury on all the evidence.

18. MINES AND MINERALS, § 176*—*when evidence sufficient to sustain verdict for death of miner due to falling of stone from roof of mine.* In an action brought under the Miners' Act (J. & A. ¶ 7475 *et seq.*), to recover for the death of plaintiff's intestate as the result of the fall of a large stone from the roof of the room where intestate was working when killed, a verdict for plaintiff held not manifestly against the weight of the evidence.

Martha Schechtman, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 21,004. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed February 1, 1916.

Statement of the Case.

Action by Martha Schechtman, plaintiff, against the Chicago Railways Company, defendant, in the Superior Court of Cook county, to recover for personal injuries sustained while attempting to alight from defendant's street car on which she was a passenger. From a judgment for plaintiff for \$2,000, defendant appeals.

Plaintiff's physician testified, in effect, that on September 11, 1911, about two hours after the occurrence, he found a large bruise upon her hip; bruises upon her left thigh and back, and, the following day, a slight

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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bloody discharge from the vagina, which continued for about a week, and that he continued to treat her "off and on" for pain in the back, especially on the left side, and for retroversion of the uterus. Three or four weeks before the trial, he found the uterus turned backward. He testified that he had known the plaintiff for six or seven years; that he attended her at the birth of her first child, more than two years before the accident; that six weeks after such birth, he found plaintiff's uterus to be normal in size, and that "involution was practically complete at that time." He further testified that at the time of the accident plaintiff was in good health.

The plaintiff was three months advanced in pregnancy at the time of the accident and gave birth to a child six months thereafter.

A motion to strike out the testimony with reference to retroversion of the uterus, as not connected with the accident, was denied. The court gave the following instruction for plaintiff:

"The jury are instructed that the law requires the employees of common carriers to do more than to stop reasonably long enough for passengers to safely alight from its cars. They are bound and required to ascertain and know that no passenger is in the act of alighting from the car before putting it in motion again. If an employee fails in that respect, then such failure is imputed to his employer and is actionable negligence on the part of the employer, provided the passenger was at such time not guilty of contributory negligence."

IRA C. WOOD and FRANK L. KRIETE, for appellant;
W. W. GURLEY and J. R. GUILLIAMS, of counsel.

M. A. ZELENSKY and LYNN & HALLAM, for appellee.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Belmont v. City of Chicago, 198 Ill. App. 25.

Abstract of the Decision.

1. CARRIERS, § 464*—*when evidence as to physical condition of passenger after accident admissible.* In an action by a married woman to recover for injuries sustained while attempting to alight from defendant's street car, a motion to strike testimony tending to prove that plaintiff suffered from retroversion of the uterus is properly denied where the evidence tended to show that the conditions sought to be proved were the result of the accident.

2. NEGLIGENCE, § 191*—*when question of fact.* The question as to what constitutes negligence in a particular case is one of fact and not of law.

3. CARRIERS, § 484*—*when instruction as to duty of carrier towards passengers in starting cars erroneous.* In an action to recover for personal injuries sustained while attempting to alight from defendant's street car, an instruction that it is the duty of a common carrier of passengers to ascertain and know that no passenger is in the act of alighting before putting a car in motion, and that a failure to do so is actionable negligence, *held* reversible error, such instruction stating as a legal proposition that such conduct is negligence under all circumstances.

John W. Belmont, Plaintiff in Error, v. City of Chicago, Defendant in Error.

Gen. No. 21,817.

1. APPEAL AND ERROR, § 866*—*what insufficient abstract.* An index of the record is not a sufficient abstract of the record.

2. OFFICERS, § 36*—*when burden of proof on claimant of office.* One claiming the right to an office or position must show the legal existence of the office or position and his legal right to hold it.

3. MUNICIPAL COURT OF CHICAGO, § 4*—*who may remove deputy bailiffs.* Under the provisions of section 17 of the Municipal Court Act (J. & A. ¶ 3329), a deputy bailiff may be removed either by an order signed by a majority of the judges of the Municipal Court or he may be removed by the bailiff.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 14, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Belmont v. City of Chicago, 198 Ill. App. 25.

E. I. FRANKHAUSER, for plaintiff in error.

SAMUEL A. ETTELSON, for defendant in error; Roy S. GASKILL and GEORGE A. CURRAN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit in the Municipal Court; from the abstract of record filed in this court it appears that there was filed in the Municipal Court "a statement of claim and affidavit of plaintiff's claim;" we are given no more information concerning it. The abstract also indicates that there was a trial and "final judgment," but the nature of the judgment is unrevealed. We might properly affirm the judgment upon the presumption that it is right. An index to the record is not an abstract of record.

From the briefs it appears that plaintiff brought suit for salary as deputy bailiff of the Municipal Court, and that after trial it was adjudged that he take nothing.

Plaintiff was formerly employed as a deputy bailiff of the Municipal Court, and served from January 16, 1911, to September 11, 1911, when he was discharged by Thomas Hunter, then bailiff of the Municipal Court. On November 3, 1911, the judges of the Municipal Court ordered that plaintiff be restored to his position, and on that date he re-entered upon the duties of deputy bailiff. This suit is for salary from September 11th to November 3rd, the period of time of his discharge.

A person claiming the right to an office or position must show the legal existence of the office or position and his legal right to hold it. *Moon v. Mayor*, 214 Ill. 40; *Bullis v. City of Chicago*, 235 Ill. 472. Did plaintiff have a legal right to the position of deputy bailiff during the period of time of his discharge? This depends on whether he was legally discharged. Section 16 of

the act in relation to the Municipal Court of Chicago (chapter 37, Hurd's Ill. St., J. & A. ¶ 3328) provides for the creation of the office of bailiff of the Municipal Court and for his election thereto. By section 17 (J. & A. ¶ 3329) it is provided that "said bailiff shall appoint such number of deputies as may be determined, from time to time, by a majority of the judges of the municipal court by orders signed by them and spread upon the records of said court. * * * Any deputy bailiff shall be subject to removal for cause upon proper notice, hearing and proof at any time by an order signed by a majority of the judges of the municipal court and spread upon the records of said court. Any deputy bailiff may likewise be removed by the bailiff: *Provided, however,* that any deputy bailiff so removed may be restored to his position by an order signed by a majority of the judges of said municipal court and spread upon the records of said court."

There is no ambiguity or inconsistency in these provisions. A majority of the judges may remove a deputy bailiff, or the bailiff may remove a deputy bailiff. The fact that subsequently a majority of the judges may restore to his position any deputy bailiff who has been removed by the bailiff does not take away the power of the bailiff to remove. We are not impressed by the argument that the power given the judges to remove is in direct conflict with the power given to the bailiff to remove a deputy bailiff. It follows that when Hunter, the bailiff, discharged plaintiff on September 11th, he was legally acting under the authority of the statute, and the discharge, as far as plaintiff was concerned, was effective and complete and would remain so until a majority of the judges might conclude to restore him.

Plaintiff having failed to prove his legal right to the office during the period for which salary is claimed, is not entitled to recover, under the authorities above cited, and the judgment is affirmed.

Affirmed.

Murten v. Chicago City Railway Co., 198 Ill. App. 28.

William A. Murten, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,847. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of fact. Opinion filed February 14, 1916.

Statement of the Case.

Action by William A. Murten, plaintiff, against Chicago City Railway Company, defendant, to recover for injuries received in alighting from defendant's car. From a judgment for plaintiff for \$1,600, defendant appeals.

The evidence showed that plaintiff was riding on a southbound Indiana avenue car. His daughter, about fifteen years old, was with him. He was carrying quite a load of provisions of one kind and another in different parcels. He testified that as the car neared 29th street the conductor called out the number of the street; that plaintiff and his daughter went to the rear door; that the car came to a complete standstill about two car lengths north of 29th street, and that as he stepped down, still having one foot on the car step, the car suddenly started, throwing him down. His testimony is corroborated in certain respects by his daughter. It is not disputed that the accident happened some distance north of the usual stopping place of the car.

The story of plaintiff and his daughter was contradicted by at least seven witnesses, most of them passengers. These witnesses substantially agreed that when the car was one hundred or more feet north of 29th street plaintiff walked to the rear of the car, followed by his daughter; that the car was then in motion, going six or seven miles per hour, slowing down;

Shimeall v. Lehmann, 198 Ill. App. 29.

that the conductor warned plaintiff not to alight until the car had stopped, but plaintiff proceeded, with his arm full of bundles, to step off, and as soon as he landed on the street pavement seemed to lose his balance and fell; that the daughter started to follow but was stopped by the conductor, who barred her way with his arm, and she waited until the car stopped, and then alighted and walked back fifty feet to where plaintiff was.

JAMES TODD and WATSON J. FERRY, for appellants;
W. W. GURLEY and J. R. GUILLIAMS, of counsel.

GEORGE F. HAGEMEYER, for appellee; ZIMMERMAN &
GARRETT, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

CARRIERS, § 437*—*when evidence sufficient to show contributory negligence of alighting passenger.* In an action by a passenger against a street railway company to recover for injuries received while alighting, evidence examined and *held* to show that the injury was due to plaintiff's contributory negligence.

Wesley Shimeall, Appellee, v. Ernst E. Lehmann, Appellant.

Gen. No. 21,887. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 14, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Shimeall v. Lehmann, 198 Ill. App. 29.

Statement of the Case.

Case of the first class in the Municipal Court, for goods sold and money loaned by Wesley Shimeall, plaintiff, against Ernst E. Lehmann, defendant. Defendant filed an affidavit of defense as follows:

“Defendant believes that he has a good defense upon the merits to the whole of the plaintiff’s demand, as follows: The whole sum, exclusive of interest, sued for, including item for diamond ring and money loaned, was, on or about July 26, 1913, paid by defendant and thereafter received by plaintiff; as to item of interest, sued for, on ground of alleged vexatious delay in payment, the nature of the defense thereto is, that said payment included interest up to the time thereof, and, in addition, there was, and has been, no vexatious delay in payment.”

Upon motion of plaintiff the court struck the affidavit from the files and entered judgment against defendant.

Plaintiff contended that the affidavit was insufficient under the rules of the Municipal Court. Defendant argued that it was sufficient. The rules of the Municipal Court, which were preserved for review, provide that defendant shall file an affidavit that he believes he has a good defense upon the merits, “specifying the nature of such defense, whether by way of denial or by way of confession and avoidance in such a manner as to reasonably inform the plaintiff of the defense which will be interposed at the trial.” By rule 20 it is provided that it shall not be sufficient for defendant’s affidavit “to deny generally the facts alleged by the statement of claim * * *. Any denial of any allegation of fact made by the opposite party must not be evasive but must answer the point of substance.”

FRANCIS W. WALKER and CHARLES E. SELLECK, for appellant.

JONAS O. HOOVER, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense sufficient.* In an action of the first class in the Municipal Court of Chicago for goods sold and money loaned, the affidavit of defense examined and *held* sufficiently to comply with the rules of the Municipal Court.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when rules do not require that evidentiary facts be pleaded.* The rules of the Municipal Court of Chicago do not require that evidentiary facts be pleaded in the affidavit of defense.

3. PAYMENT, § 24*—*when plea sufficient.* In an action for goods sold and money loaned, a plea that before action defendant satisfied and discharged plaintiff's claim by payment is a good plea.

Fred F. Roberts, Administrator, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,937. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MAZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed February 14, 1916. Rehearing denied February 28, 1916.

Statement of the Case.

Action by Fred F. Roberts, administrator of the estate of Alfred Smith, deceased, plaintiff, against Chicago City Railway Company, defendant, to recover damages for wrongfully causing the death of plaintiff's intestate. Judgment was entered against defendant for \$1,750, from which defendant appeals.

The case has been tried three times. From the judgment on the second trial appeal was taken to the Appellate Court, and a majority of the branch court which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Roberts v. Chicago City Railway Co., 198 Ill. App. 31.

had the case under consideration were of the opinion that the judgment should be affirmed. (See 177 Ill. App. 400.) A writ of certiorari was granted by the Supreme Court, and the judgments of the Superior and Appellate Courts were reversed. The case is reported in 262 Ill. 228. The facts involved are narrated at length in these opinions to which reference is made.

The facts adduced upon the present trial do not differ materially from those which were considered by the Supreme Court.

It is asserted by plaintiff that this case is different in that it is now claimed in an additional count that defendant was guilty of a violation of the municipal ordinance requiring a fender to be attached to the front of the car in such a manner that pedestrians would not be injured or thrown under the wheels of the car, and that the violation of this ordinance was the proximate cause of intestate's death. The evidence showed not only that the car was equipped with the required fender but that the presence or absence of a fender had nothing to do with the accident.

FRANKLIN B. HUSSEY and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

CHARLES C. SPENCER, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1727*—*when conclusions of Supreme Court on former appeal binding on Appellate Court.* In an action to recover for the wrongful death of plaintiff's intestate, on a second appeal to the Appellate Court involving facts not materially different, the conclusions of the Supreme Court on the former appeal as to the contributory negligence of plaintiff's intestate and the negligence of defendant are controlling.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. STREET RAILROADS, § 103*—*when violation of ordinance insufficient to overcome contributory negligence.* The contributory negligence of a pedestrian in attempting to cross two car tracks between two approaching cars, the view of which was unobstructed, and when under no necessity of doing so, will prevent recovery for his death, even though the cars were not equipped with fenders as required by ordinance.

3. STREET RAILROADS, § 131*—*when evidence sufficient to show compliance with fender ordinance.* In an action against a street railroad to recover for the death of a pedestrian, evidence examined and held to show defendant's compliance with the ordinance requiring fenders.

**Jesse Wilcox, Administrator, Defendant in Error, v.
International Harvester Company of America,
Plaintiff in Error.**

Gen. No. 21,725.

1. MASTER AND SERVANT, § 701*—*when evidence sufficient to support findings in action under Occupational Diseases Act.* In an action under the Occupational Diseases Act (J. & A. ¶ 5433) to recover for the injury to one employed as a compositor, alleged to have been caused by an occupational disease, evidence examined and held sufficient to support the jury's finding that lead poisoning is an incident to the work of a compositor; that plaintiff suffered from lead poisoning; that the disease was contracted in defendant's shop, and was contracted because of the wilful violation of the Occupational Diseases Act by defendant; that the disease continued for two years and finally caused plaintiff's death.

2. ABATEMENT AND REVIVAL, § 2*—*what actions within Survival Act.* The provision of the Survival Act of 1872 (J. & A. ¶ 172), that "actions to recover damages for an injury to the person" shall survive the death of the person injured, applies only to cases where the injured person dies from some cause other than his injuries, and if death result from his injuries, the action must be under the Injuries Act (J. & A. ¶ 6184).

3. ABATEMENT AND REVIVAL, § 2*—*when action for personal injury does not survive at common law.* There is no basis at common law for the recovery of damages for the death of a human being,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and a right of action for a personal injury dies with the person injured.

4. ABATEMENT AND REVIVAL, § 2*—*when right of action under Occupational Diseases Act survives.* The Survival Act (J. & A. ¶ 172; Ill. Rev. St., ch. 3, sec. 123) applies to the right of action given by section 15 of the Occupational Diseases Act (J. & A. ¶ 5447) to one whose health has been injured, and where the plaintiff dies, pending the action, from the disease his administrator may be substituted as plaintiff.

5. DEATH, § 14*—*where separate rights of action arise under Occupational Diseases Act.* Section 15 of the Occupational Diseases Act (J. & A. ¶ 5447) gives separate rights of action to the person sustaining an injury to his health by a wrongful violation of the act, and to his widow, lineal heirs, dependent children and other dependents in case of his death from the disease.

6. JUDGMENT, § 238*—*when entry nunc pro tunc proper.* Where plaintiff in a cause of action which survives dies after a verdict is returned in his favor, but before judgment is entered, judgment may be entered *nunc pro tunc* as of the day the judgment was returned.

7. TRIAL, § 256*—*when poll of jury not waived by agreement for sealed verdict.* An agreement for a sealed verdict does not carry with it by implication a waiver of the polling of the jury.

8. TRIAL, § 256*—*when objection for failure to poll jury waived.* One who permits without objection the entry of an order for a sealed verdict, which contains a provision waiving the polling of the jury, cannot be heard to object on appeal that he was not permitted to poll the jury.

9. EVIDENCE, § 282*—*when medical books admissible.* While medical books are not admissible as substantive proof of the facts they set forth, where an expert testifies that his opinion is based on a medical book or report, such book or report may be read to contradict him, and this may be done where the statement that he relied on such book or report is elicited on cross-examination.

10. APPEAL AND ERROR, § 1489*—*when admission of improper evidence not ground for reversal.* Even though the court admits in evidence statements from medical books and reports which are not admissible, such admission is not ground for reversal where the judgment is supported by other evidence.

HOLDOM, J., dissenting.

Error to the Circuit Court of Cook county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in this court at the October

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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term, 1915. Affirmed. Opinion filed February 14, 1916. Rehearing denied February 28, 1916.

DAVID A. OREBAUGH, for plaintiff in error; EDGAR A. BANCROFT, of counsel.

CHARLES C. SPENCER, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Mary V. Sheetz began work as a compositor in the printing shop of the defendant corporation in November, 1910, and worked there setting and distributing type for two years. She then became ill and was not afterwards able to work. She brought this action April 1, 1914, and it was tried in December of that year. A verdict was returned December 31st finding defendant guilty and assessing plaintiff's damages at \$10,000. Plaintiff died January 3, 1915. Her death was suggested and January 23rd Jesse Wilcox as her administrator was substituted as plaintiff. February 6th plaintiff remitted \$2,000 and judgment for \$8,000 damages was entered *nunc pro tunc* as of December 31, 1914.

Plaintiff's right of action is based on the Occupational Diseases Act of 1911. (Laws of 1911, p. 334, J. & A. ¶ 5433.) The Act provides *inter alia* as follows:

"Sec. 1. That every employer of labor in this State, engaged in carrying on any work or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employes to the danger of illness or disease incident to such work or process, to which employes are not ordinarily exposed in other lines of employment, shall, for the protection of all employes engaged in such work or process, adopt and provide reasonable and approved devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work or process." (J. & A. ¶ 5433.)

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“Sec. 15. For any injury to the health of any employe proximately caused by any wilful violation of this Act or wilful failure to comply with any of its provisions, a right of action shall accrue to the party whose health has been so injured, for any direct damages sustained thereby; and in case of the loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of such deceased person, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support upon such deceased person, for a like recovery of damages for the injury sustained by reason of such loss of life, not to exceed the sum of ten thousand dollars: *Provided*, that every such action for damages in case of death shall be commenced within one year after the death of such employe.” (J. & A. ¶ 5447.)

The fundamental question in the case is whether or not lead poisoning is an occupational disease incident or peculiar to the work of a compositor. If it is not, the act does not apply and there can be no recovery.

There is in the record much opinion evidence on the question presented, given by physicians, compositors, managers and foremen of printing offices and by an expert in occupational lead poisons, employed by the Federal Department of Labor and formerly employed by the State of Illinois in the same capacity. The testimony of the expert witnesses is conflicting and we shall not attempt to state even the substance of it. Dr. Alice Hamilton, the government expert above mentioned, called by the defendant, testified that in Bulletin 95, issued by the United States Government, it was stated that a most remarkable freedom of lead poisoning was found among the members of the London Society of Compositors, and she also testified that in the same report it was stated that in ten years there were 1,780 cases of lead poisoning in the printing trades in Vienna and its neighborhood.

A careful examination of the evidence has led the majority of the court to the conclusion that from it the

jury might properly find that lead poisoning is an incident to the work of the compositor; that plaintiff suffered from lead poisoning from November, 1912, to the time of the trial; that the disease was contracted in the shop of the defendant, and was contracted because of the wilful violation of the Occupational Diseases Act by the defendant, and that the disease so contracted continued for two years and finally caused her death.

Section 15 of the Act (J. & A. ¶ 5447) gives a right of recovery to any person sustaining injury to his health by reason of a wilful violation of the act; and the question is presented whether in case of the death of the plaintiff from disease so contracted, the right of action for injury to his health survives. In this State, independently of the Occupational Diseases Act, where death results from the wrongful act, the cause of action does not survive. The Survival Act of 1872 amending section 123 of the Administration Act (J. & A. ¶ 172), and providing that "actions to recover damages for an injury to the person, except slander and libel," shall survive the death of the person injured, has reference only to cases where the injured person dies from some cause other than his injuries, and if death is the result of his injuries, then the action must be brought under the Injuries Act. *Ohnesorge v. Chicago City Ry. Co.*, 259 Ill. 424.

In this case the contention of defendant in error is that plaintiff's death was caused by lead poisoning which resulted from the wilful violation of the Occupational Diseases Act by the defendant. A recovery can only be sustained on the theory that the right of action for the injury to plaintiff's health, caused by the wilful violation by the defendant of the Occupational Diseases Act, survives, although such injury to her health caused her death.

By the common law the death of a human being, although wrongfully caused, affords no basis for recovery of damages, and a right of action for personal

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injury dies with the person injured. Therefore, in cases like this, the right of recovery depends entirely upon the statute law. It is by the Occupational Diseases Act and the Survival Act that we must test the objection that the administrator of the plaintiff cannot recover for the injury to her health because such injury caused her death. Section 15 of the Act gives a right of action to any person sustaining an injury to his health by reason of a wrongful violation of the statute, and also gives a right of action in case of loss of life to the widow, lineal heirs, dependent children, and others dependent on the deceased person. Section 9 of the Federal Employers' Liability Act (36 Statutes, 143, sec. 291 provides): "That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury." Paragraph 1 of the Act provided for two distinct rights of action; one in the injured person for his personal loss and suffering where the injuries are not immediately fatal; and the other in his personal representative where the injuries immediately or ultimately result in death. Before the enactment of section 9 there was no provision for the survival of the right given to the injured person, and so under the operation of the rule of the common law it would die with him.

In *St. Louis, I. M. & S. Ry. Co. v. Craft*, 237 U. S. 648, 9 N. C. C. A. 754, it was held that the right of action given by the statute to the injured person, and the right of action given to his personal representative for the benefit of the widow, etc., of the injured person, were entirely separate and distinct, and that a recovery might be had on both rights of action. In the opinion it was said;

“Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong.”

It is true that the Federal Employers' Liability Act provided in terms that a right of action given by the act to a person suffering an injury should survive to his or her personal representative. The statute of 1872 provides that, “In addition to the actions which survive by common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person, except slander and libel.” Illinois Rev. St., ch. 3, sec. 122 (J. & A. ¶ 172). We think that the Survival Act applies to the right of action of the party whose health has been injured, given by section 15 of the Occupational Diseases Act (J. & A. ¶ 5447); that the two causes of action given by that section are separate and distinct; that the right of action given to the injured person is in no way affected by the giving of another right of action to the widow of the injured person and others in case of his death. It follows from what has been said that in our opinion the court did not err in substituting the administrator of the plaintiff as the plaintiff.

As the right of action survived the court did not err in entering judgment *nunc pro tunc* as of the day the verdict was returned. *Bunker v. Green*, 48 Ill. 243.

The cause was submitted to the jury December 30th. On that day the counsel for the respective parties agreed that if a verdict was not returned by the usual time of adjournment for the day, the jury might seal the verdict and leave it with the clerk to be opened and read the next day. The court thereupon directed the

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clerk to enter an order that in case the jury agreed after the hour of adjournment, they should sign and seal the verdict, and that in such case they were discharged from further service and the polling of the jury was waived. The order that the jury be discharged and the polling of the jury waived was entered on the theory that the agreement for a sealed verdict carried with it by implication a waiver of the polling of the jury. This was erroneous, for the agreement for a sealed verdict carried with it no such implication. But if the defendant objected to the order, he should have made it known to the court. A party has no right to stand by and permit steps to be taken without objection, and if the result does not favor him then raise objections. *Powell v. Feeley*, 49 Ill. 143. Again, the conduct of the defendant was such that it cannot now be heard to object that it was not permitted to poll the jury. The time to make the objection was before the verdict was opened, and if this had been done the jurors might have been brought in and the verdict read in their presence; but the defendant made no objection to the opening and reading of the verdict until ten days afterwards.

The rule is well settled in this State that medical books are not admissible as substantive proof of the facts they set forth; but where an expert witness testifies that his opinion is based on a medical book or report, such book or report may be read to contradict him, and this may be done where the statement that the witness relied on such book or report is made on cross-examination. *Pinney v. Cahill*, 48 Mich. 584. Medicine is not considered one of the exact sciences; it is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that what is considered a sound induction last year may be considered an unsound one this year; and we cannot tell whether what we read is not something

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that the author now rejects. In this case Dr. Alice Hamilton, the government expert, testified that her views had changed on some of the points since she wrote the report of the committee appointed by the Governor of Illinois to investigate as to the facts preparatory or preliminary to the passage of the Occupational Diseases Law, which was drafted by her; that since that time she had traveled in England, Belgium and Austria making investigations of lead industries and now knew more about certain industries than she did then; that she was not very proud of the report wherein she stated the different divisions in the printer's trade that were most dangerous; that she would not put it in that way now; that she now knew a great deal more than she did in 1910.

The court improperly admitted certain statements from medical books and reports that were not admissible for the purpose of contradiction; but in view of all the evidence we do not think that for the admission of such evidence the judgment should be reversed. In the opinion of the majority of the court the record is free from reversible error, and the judgment is affirmed.

Affirmed.

MR. JUSTICE HOLDOM dissenting. With some hesitation and much trepidation I dissent from the conclusions to which my brethren have come in the disposition of this case.

My mind is not convinced from the proofs in the record that the plaintiff's physical troubles which, after verdict, culminated in her death, were attributable to "lead poisoning" or that "lead poisoning" is an occupational disease within the meaning of the "Occupational Disease Act" of 1911. Neither do I believe that the manner or method in which defendant conducted its composing room in which plaintiff worked as a compositor offended that act. It is my opinion from the evidence that plaintiff suffered from perni-

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cious anemaeia and that such anemaeia was in no way traceable to "lead poisoning." There is much evidence in the record of a very conflicting nature as to "lead poisoning" being an "occupational disease," as applied to compositors. To my mind there is no distinct preponderance of proof upholding such contention, but it seems to me that the conclusion at which a majority of the court have arrived is grounded on surmise and conjecture. There is no reliable evidence in the record which in my judgment warrants the conclusion that plaintiff was afflicted with "lead poisoning." There is much testimony of a theoretical character that "lead poisoning" is a disease contracted by compositors in the exercise of their calling, but most all of the testimony from witnesses who have practical knowledge and experience of the subject is strongly against such contention. I do not believe that it can be said to be proven by a clear preponderance of the medical evidence found in the record that plaintiff did suffer from lead poisoning. To reach such a conclusion, it seems to me is to do so by a strong-handed method and not from the weight of the evidence. It is my judgment that no cause of action is established by the proofs.

**Kissel Motor Company, Appellant, v. Rudolph Docauer
and Adolph Docauer, Appellees.**

Gen. No. 21,838. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 14, 1916.

Statement of the Case.

Action of replevin by Kissel Motor Company, a corporation, plaintiff, against Rudolph Docauer and Adolph Docauer, defendants. From a judgment for defendants, plaintiff appeals.

The evidence showed that November 1, 1912, defendants bought of the plaintiff an auto truck, and in part payment therefor gave twelve notes for \$125 each, one thereof payable on or before the 6th day of each succeeding twelve months, and to secure said notes gave a chattel mortgage on the truck purchased. The defendants and their brother Jerry were partners in an auto express business. The first four notes falling due were paid, and the controversy is as to the note which fell due April 6th and the one which fell due June 6th. Jerry Docauer testified that he and Adolph called on Mr. Rix, the assistant manager of plaintiff in Chicago, about April 1st, and told him that they had some money coming from plaintiff and wanted a statement; that Rix said: "Never mind the April note; that he would furnish us a statement of all our credits, and if there was anything to be paid for these two April notes that we would pay the balance, and he agreed to it that he would send us our statement."

Rix died before the trial.

The court gave for the defendants the following instruction:

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“The jury are further instructed that if they believe from the evidence that the defendants requested the plaintiff company manager to apply credits claimed by them to be due from the company toward the payment of the April note, and that such manager stated, in substance, that he would do so, and requested them not to pay any further attention to the April note until he rendered them a statement of such credits and that the statement of account was not thereafter rendered them, and that no demand or request was thereafter made upon the defendants for payment of such note, such facts will void any right which might otherwise accrue to the mortgagee company, plaintiff herein, to forfeit the mortgagors’ interest in the property, as for a default of the mortgage terms for failure to pay said April note, until such time as the mortgagee company should render such statement and demand payment thereof.”

NORMAN K. ANDERSON, for appellant.

FRANCIS A. McDONNELL, for appellees; GERALD BARRY of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 106*—*when evidence of conversation with deceased person admissible.* Evidence of one not a party to a suit as to a conversation with an assistant manager of the corporation plaintiff who had died before the trial is admissible.

2. INSTRUCTIONS, § 119*—*when giving of instruction not founded on evidence improper.* In an action of replevin, an instruction examined and held improper as not being founded on the evidence.

3. BILLS AND NOTES, § 96*—*when evidence insufficient to show valid agreement for extension of time of payment.* Evidence examined and held not to show a valid agreement for the extension of the time for the payment of a note.

4. BILLS AND NOTES, § 96*—*what essential to extension of time for payment.* An extension of the time for the payment of a note entered into before the note is due must be for a definite time.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. REPLEVIN, § 156*—*when order for return of mortgaged property not proper.* In an action of replevin for property held under a chattel mortgage, where the evidence shows that at the time of the trial all the notes were due, that the condition of the mortgage was broken and plaintiff was entitled to possession of the mortgaged property, it is improper to order the return of the property.

Oliver W. Holmes et al., trading as Holmes, Pyott & Company, Appellees, v. David Suffrin, Appellant.

Gen. No. 21,844. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 14, 1916. Rehearing denied February 28, 1916.

Statement of the Case.

Action by Oliver W. Holmes, James M. Pyott and David A. Pyott, trading as Holmes, Pyott & Company, a copartnership, plaintiffs, against David Suffrin, defendant. From a judgment for plaintiffs for \$1,414.47, defendant appeals.

The evidence showed that defendant was the owner of a building in Chicago and June 7, 1911, contracted with the United Construction Company for the remodeling and improvement of his building. The Construction Company June 8th made a contract with plaintiffs to furnish and erect the structural and ornamental iron and steel work required in such improvement for the sum of \$2,189. The contract between defendant and the Construction Company included a waiver of the right to a mechanic's lien, but this was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not known to the plaintiffs until after the controversy out of which this suit grew had arisen. The Construction Company failed to pay plaintiffs the amount due them under the contract as the same became due. The contention of plaintiffs is that defendant promised, in case the plaintiffs would proceed with and complete the work they had undertaken to pay them the amount due and to become due, and that this was a direct and original promise and not within the Statute of Frauds; that the promise to pay the plaintiffs was based on a sufficient consideration and therefore was original so far as defendant was concerned.

That the promise was made was testified to by Netchin, Holmes, Pyott, Anthony, Forcey and Shober, and denied by Suffrin.

GOLDZIER, RODGERS & FROEHLICH, for appellant; EDMUND W. FROEHLICH, of counsel.

HARRIS F. WILLIAMS, for appellees; GEORGE F. ORT, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 385*—*when evidence sufficient to show promise to pay.* In an action by a subcontractor against the owner of the property, evidence examined and held sufficient to warrant a finding that defendant had promised to pay the amount due and to become due under the subcontract.

2. FRAUDS, STATUTE OF, § 12*—*when manner in which account charged evidence of original promise.* In an action by a subcontractor against the owner of the property to recover the amount due for work done by plaintiff, where it is claimed that the work was done under a promise of defendant to pay, evidence that the account was charged on plaintiff's books, to the principal contractor,

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

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while strong evidence, when unexplained, to show that the credit was given to the latter, is not conclusive of the fact.

3. FRAUDS, STATUTE OF, § 2*—*when debtor not released by oral promise.* A valid oral promise may be made with regard to the debt of a third person without releasing the original debtor.

4. FRAUDS, STATUTE OF, § 126*—*when evidence sufficient to show promise to be original.* In an action by a subcontractor against the owner of the property to recover on a promise to pay for the work done under the contract, evidence examined and *held* sufficient to warrant a finding that the promise was direct and original and not within the Statute of Frauds.

**Pauline Ehrhardt, Appellee, v. George M. Ehrhardt,
Appellant.**

Gen. No. 21,856. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Reversed. Opinion filed February 14, 1916.

Statement of the Case.

Pauline Ehrhardt filed her bill for divorce against George M. Ehrhardt and he filed a cross-bill against her. June 25, 1914, both bill and cross-bill were dismissed for want of equity, and the same day an order was entered that the defendant pay to complainant \$108 on account of her solicitor's fees in the case. An order was entered commanding defendant to show cause why he should not be attached for contempt in failing to pay complainant \$108 solicitor's fees, and on hearing of the rule April 12, 1915, defendant was adjudged guilty of contempt and an order entered that he be attached and confined in the county jail until he pay such solicitor's fees, but not exceeding six months. From that order this appeal is prosecuted by the defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Stricker v. Umbdenstock, 198 Ill. App. 48.

WILLIAM B. BERGER and ALVIN E. STEIN, for appellant.

No appearance for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

DIVORCE, § 135*—*when order to pay solicitor's fees improper.* Where a wife's bill for divorce is dismissed for want of equity, the court has no authority to order defendant to pay complainant solicitor's fees, and a commitment for contempt for failure to pay such fee will not be allowed to stand.

Max Stricker, Appellee, v. William M. Umbdenstock, Appellant.

Gen. No. 21,962. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in this court at the October term, 1915. Appeal dismissed. Opinion filed February 14, 1916.

Statement of the Case.

Trespass on the case by Max Stricker, plaintiff, against William M. Umbdenstock, defendant.

Judgment was rendered for plaintiff March 22, 1915. The time for filing the appeal bond was by orders properly entered extended "to and including June 1, 1915." The bond was not filed until June 2nd.

FURBER & WAKELEE, for appellant.

ADLER & LEDERER, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crystal Spring P. H. & C. Co. et al. v. Becklenberg, 198 Ill. App. 49.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 671*—*when extension of time for filing bond not warranted.* Where the time within which an appeal bond is to be filed is fixed by statute, the requirement is mandatory and jurisdictional, and the court from which the appeal is taken cannot extend the time.

2. APPEAL AND ERROR, § 671*—*when time for filing appeal bond may be extended.* Where a statute requires the court allowing an appeal to fix the time for filing the appeal bond in its order allowing the appeal, the court may, before the expiration of the time so fixed, extend the time for filing.

3. APPEAL AND ERROR, § 1112*—*when motion to dismiss for failure to file bond unnecessary.* Where an appeal bond is not filed in the time fixed by the court by an extension or otherwise, under a statute requiring the court to fix the time of filing, the appeal must be dismissed and no motion is necessary, the requirement being mandatory and jurisdictional.

**Crystal Spring Percheron Horse & Cattle Company and
M. C. Blanchett, Plaintiffs in Error, v. Fred Beck-
lenberg, Defendant in Error.**

Gen. No. 21,786. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 14, 1916.

Statement of the Case.

Action by Crystal Spring Percheron Horse & Cattle Company, a corporation, and M. C. Blanchett, plaintiffs, against Fred Becklenberg, defendant.

To reverse a judgment of *nil capiat* entered on a verdict instructed by the trial judge, on the motion of defendant, at the conclusion of so much of plaintiffs' case

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as the trial judge admitted in proof, plaintiffs prosecute this writ of error.

The cause of action rests in a contract between the parties for the exchange of certain properties in Chicago and North Dakota. Plaintiffs seek to recover damages for breach of the contract by defendant, by terms of which contract defendant was to convey a flat building which he claimed to own in Chicago to plaintiffs, and as compensation therefor plaintiffs were to convey to defendant certain ranch property in North Dakota with cattle, farm machinery, etc., thereon.

Plaintiffs and defendant, within the time as extended for the performance of the contract and on November 6, 1913, furnished each other with abstracts of title to their respective properties. The abstract furnished by defendant showed title in him November 4, 1913, to the Chicago property which he had agreed by the contract to convey to plaintiffs, subject to certain incumbrances. Plaintiffs likewise tendered deeds, etc., running to defendant, of their property to the holder of the contract in escrow at his office in Chicago, that being the place appointed in the contract for the passing of the papers and the completion of the transaction. What plaintiffs did in this regard they contend constituted a performance by them of their contract obligations so far as the attitude and conduct of defendant made performance possible.

On November 22, 1913, defendant conveyed to one Frank C. Rothje by warranty deed the property which he had contracted to convey to plaintiffs, which deed was thereafter and on November 24, 1913, filed for record and duly recorded in the recorder's office of Cook county. Thereupon plaintiffs, without any other demand being made, commenced this action for damages claimed to have been sustained by them on account of defendant's breaching his contract with them, upon the theory that as defendant had put it out of his power by the conveyance to Rothje to carry out his

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part of the contract, the law gave them a right of immediate action for damages and absolved them from further performance of the contract (which performance, but for defendant's dereliction, would have been incumbent upon them). On the theory that plaintiffs were not absolved from doing all those things that the contract provided they should do, notwithstanding defendant had by his deed to Rothje put it out of his power to convey to them the Chicago property as contracted, the trial judge rejected, on the objections of defendant, all the material evidence offered by plaintiffs to establish their claim for damages.

BRUNDAGE, LANDON & HOLT, for plaintiffs in error.

EDWARD H. MORRIS and SONNENSCHN, BERKSON & FISHELL, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 272***—*what sufficient to constitute rescission.* Where one of the parties to a contract for the exchange of realty conveys the property which he had contracted to exchange to a third person, such conveyance may be treated by the other party as a rescission, although the latter has not yet performed all the things which it would have been required to perform, had such conveyance not been made.

2. **CONTRACTS, § 272***—*when bringing of action sufficient to show contract treated as rescinded.* Where one of the parties to a contract for the exchange of realty brings an action against the other to recover damages for a breach of the contract after a conveyance by such other to a third person of the property he had agreed to exchange, the bringing of such is equivalent to treating the contract as rescinded.

3. **DAMAGES, § 65***—*what proper measure on breach of contract to exchange realty.* In an action to recover damages for breach of a contract to exchange realty, the measure of damages is the difference between the value of the property agreed to be conveyed by plaintiff to defendant and that which defendant agreed to convey to plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Winters v. Aurora, Elgin & Chicago Rys. Co., 198 Ill. App. 52.

**Janet S. Winters, Appellee, v. Aurora, Elgin & Chicago
Railways Company, Appellant.**

Gen. No. 21,829. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of fact. Opinion filed February 14, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Janet S. Winters, plaintiff, against Aurora, Elgin & Chicago Railways Company, defendant, to recover for personal injuries. From a judgment for plaintiff for \$7,500, defendant appeals.

The declaration, consisting of one count, charged as negligence defendant's failure to remove a certain door or covering from over the steps of the car on which plaintiff was a passenger, and carelessly, negligently and improperly permitting the door or covering to remain upon the platform of said car and upon and over the steps thereof, rendering the same dangerous and hazardous as to the plaintiff, and carelessly and negligently failing to notify and warn plaintiff as to the condition and position of said door or covering over said steps and the dangers incident thereto; that plaintiff, in consequence of such negligence, while in the exercise of ordinary care, and during the nighttime when it was dark, and while attempting to leave said car, under the direction of defendant's servant, stepped from and off the door or covering of said steps, instead of stepping down to and upon the steps and from said steps down to and upon the ground, causing plaintiff to fall and to be precipitated a great distance from said car down to and upon the ground, injuring her, etc. The evidence showed that on the day of the accident to plaintiff she

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took defendant's car at Bellwood with the intention of leaving it at Des Plaines avenue, Forest Park.

It was not denied that defendant's car platforms were equipped with flaps, which let down from the steps and were kept down while the cars were in motion. The evidence showed that at stations where defendant maintained elevated platforms, passengers got off the cars on a level, without the raising of the flaps from the steps; where station platforms were upon the ground the flaps were raised so that passengers alighted by walking down the steps, which ran downward to the station platform.

It appeared that at the time of the accident the car had stopped at the Des Plaines avenue station and remained stationary until after the accident. Plaintiff, who was seated in the car, came out on the platform and took hold of a perpendicular rod with her left hand and of another part of the car with her right hand. Plaintiff testified that it was dark and that she stepped off of the car expecting to step on a step leading from the car platform, but as there was no step there, she fell.

Plaintiff testified also that it was sufficiently light so that she saw plainly that the vestibule door was open and knew the flap was down over the steps when she started to get off, and that she looked down for the express purpose of seeing where she was walking.

She testified further that she knew that the first step down would be some little distance inside the sheathing of the car and kept that in mind. Also, that she knew the flap was down over the steps when she started to get off.

Plaintiff had many times traveled upon defendant's car between Bellwood and Des Plaines avenue station, Forest Park, and was cognizant of the construction of the car platform and of the station platforms at both of these stations.

There was evidence that she told two persons that

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she was pushed off the train. One of them, Dr. Pickard, produced a statement signed by plaintiff to that effect. Plaintiff claims that the paper she signed was in blank at the time she signed it, but there was evidence against such claim.

She also testified that it was dark upon the platform at the time of the accident. Her sister-in-law, who was with her, testified that it was sufficiently light so that she could plainly see that the vestibule door was open.

Several witnesses testified as to the abundance of light, both on the platform of the car and around Des Plaines avenue. In the testimony of some of the witnesses, lights were specifically mentioned as follows: About twenty-five feet from the station platform was the entrance archway of Forest Park, on which were seven clusters of 60-watt forty candle-power tungsten lamps with five lights in each cluster, which threw 1,400 candle-power of brilliant tungsten illumination directly onto defendant's train, the vestibule door and the platform from which plaintiff alighted; lights in the tower of Forest Park, about fifteen feet removed from the station platform, and an arc lamp on a pole thirty-five feet high just inside the entrance to Forest Park, with a lighting power of 3,500 candles; two street electric lights within fifty and one hundred feet of defendant's track; four clusters of incandescent lights of five lights each on the crossing gates, and a cluster of lights on the watchman's shanty immediately west of Des Plaines avenue; a cluster of lights on a pole on the east side of Des Plaines avenue; also tungsten and gas arcs on the front porch of a fruit store just south of defendant's tracks; all of which were burning at the time of the accident.

Plaintiff testified that she was carried after the accident. Other witnesses testified that she walked. Plaintiff also attributed the ailments from which she was suffering to injuries received as the result of her fall from defendant's car, while there was evidence

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that all of the important physical ailments of which she complained existed prior to her fall from defendant's car. She also testified that after the accident she was an invalid and unable to do her own work. Disinterested witnesses testified to the contrary.

DAVID J. PEFFERS, ROBERT J. WING and FRANKLIN B. HUSSEY, for appellant.

JAMES L. BYNUM, for appellee; BERNHARDT FRANK, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to show contributory negligence.* In an action by a passenger to recover for injuries alleged to have been caused by the carrier's negligence in failing to lift the platform covering the steps of the car, whereby plaintiff fell and was injured in alighting, evidence examined and held to show a lack of prudence on plaintiff's part constituting contributory negligence.

2. APPEAL AND ERROR, § 1802*—*when reversal without remand authorized.* Under section 120 of the Practice Act (J. & A. ¶ 8657), the Appellate Court has power, on appeal from the judgment of the trial court, to reverse a judgment without remanding the cause where the weight of the evidence does not justify the verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Meinshausen v. Alter, 198 Ill. App. 56.

Henry Meinshausen et al., Appellees, v. Louis C. Alter et al., on appeal of Walter D. Braden, Appellant.

Gen. No. 21,860. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 14, 1916. Rehearing denied February 28, 1916.

Statement of the Case.

Bill by Henry Meinshausen and others, complainants, against Louis C. Alter, Walter D. Braden and others, defendants, to foreclose a trust deed. From a decree of foreclosure ordering the sale of the property to satisfy the amount found due by the master's report, defendant Braden appeals.

It appeared the trust deed foreclosed was given to secure the principal sum of \$1,500 and interest, payable half yearly, the interest being evidenced by coupon interest notes of \$45 each. Two of these notes matured and were not paid at the time the bill was filed. The mortgaged property had before this time been sold for taxes and the certificate of sale was outstanding, uncanceled and unreleased, at the time the bill was filed. The trust deed contained a covenant authorizing the legal holder of the indebtedness to declare due the whole amount unpaid upon default in payment of any interest coupon for thirty days, or in the event of failure to pay taxes on the mortgaged premises when due. In accordance with these provisions, complainants declared the whole sum due by reason of the nonpayment of the two interest coupons and the nonpayment of taxes and the sale of the mortgaged premises by reason of such nonpayment.

Defendant Braden confessed and endeavored by his

answer to avoid the legal consequences of these facts. He contended that his agent paid these interest coupons at the place where they were payable; that the person to whom the interest was paid delivered to appellant's agent two coupon interest notes for \$45 each, duly canceled. It transpired that these coupon interest notes did not relate to the mortgaged property, but to other property near by, which was mortgaged by another trust deed to the same trustee and was of like tenor, date and amount as that secured by the trust deed foreclosed. There were many other such trust deeds in many essential particulars the same as that found in the bill in the record, but covering other, though contiguous, property. It appeared that there was some negligence on the part of the agent of defendant paying in two coupons due under a trust deed covering property other than that secured by the trust deed in this record, although complainants denied this.

JOSEPH ROSENBERG, for appellant.

ALEXANDER H. HEYMAN, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **PRINCIPAL AND AGENT, § 149***—*when principal bound by negligence of agent.* Negligence of an agent in accepting interest coupons from another mortgage than that of the principal on which he had been directed to pay the interest is negligence of the principal.

2. **MORTGAGES, § 599***—*when ownership of certificate of sale no defense on foreclosure for failure to pay taxes.* The ownership by the mortgagor of the certificate of sale of the mortgaged property which had been sold for nonpayment of taxes is no defense on the foreclosure of the mortgage under a provision therein authorizing the legal holder of the indebtedness to declare due the whole amount unpaid in the event of failure to pay taxes on the mortgaged premises when due.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anderson v. Malm, 198 Ill. App. 58.

Hilda M. Anderson, Appellant, v. Richard Malm, Appellee.

Gen. No. 21,893.

1. LIBEL AND SLANDER, § 145*—*when evidence not sufficient to show accusation of fornication.* Evidence in an action of slander examined and *held* not sufficient to show that defendant had accused plaintiff of fornication.

2. LIBEL AND SLANDER, § 56*—*when communication privileged.* Words spoken by the pastor of a church while matters concerning a member's conduct are under inquiry at a regular meeting of the congregation are privileged and not actionable in the absence of express malice, when spoken by the pastor as pastor and presiding officer of the meeting.

3. LIBEL AND SLANDER, § 145*—*when evidence insufficient to show slander.* In an action of slander, evidence *held* to show that the utterance complained of was spoken by defendant as pastor of a congregation and presiding officer of a meeting of the congregation at which matters concerning plaintiff's conduct were under inquiry, and that they were spoken in lieu of defendant's duty.

4. LIBEL AND SLANDER, § 160*—*when questions of privileged communication and malice for court.* In an action of slander, condition of proofs at close of plaintiff's case *held* to be such as to render the questions of privileged communication and malice for the determination of the court.

5. LIBEL AND SLANDER,—*when direction of verdict proper.* In an action of slander, evidence examined and *held* to warrant the directing of a verdict for defendant.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 14, 1916.

JAMES J. LEAHY, for appellant; ALBERT O. OLSON, of counsel.

VICTOR ELTING and CHANNING L. SENTZ, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

This is an action of slander instituted by plaintiff, a member of the First Scandinavian Church of Winnetka in Cook county, and a manicurist and hairdresser by occupation, against the defendant, the pastor of the church. Plaintiff, at the time the words complained about were uttered, was in process of being disciplined for certain alleged misconduct on her part in her relationship as a member of the church, and the question of expelling plaintiff was before a meeting of the congregation for discussion. Defendant as pastor was in charge of the meeting. The conduct of plaintiff as a creator of disturbances was discussed at the meeting. It is alleged that defendant during the meeting requested plaintiff to ask forgiveness, and plaintiff avers that what defendant said and did at that meeting amounted to charging her with being guilty of fornication. The talks at the meeting by the defendant and the church members were in the Swedish language. The culpable words spoken by defendant in Swedish are in the declaration averred to be equivalent to the following words in the English language: "Hilda Anderson is to ask for forgiveness. It is not necessary for us to talk about that" (meaning the charge for which plaintiff should ask forgiveness). "I can read it in God's word." Thereupon defendant turned to the 5th chapter of the First Epistle of St. Paul to the Corinthians (a chapter found in the New Testament division of the King James' revision of the Holy Bible), and read therefrom as follows:

"It is reported commonly that there is fornication among you, and such fornication as is not so much as named among the Gentiles, that one should have his father's wife.

"2. And ye are puffed up, and have not rather mourned, that he that hath done this deed might be taken away from among you.

"3. For I verily, as absent in body, but present in spirit, have judged already, as though I were present, concerning him that hath so done this deed,

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“4. In the name of our Lord Jesus Christ, when ye are gathered together, and my spirit, with the power of our Lord Jesus Christ.

“5. To deliver such an one unto Satan for the destruction of the flesh, that the spirit may be saved in the day of the Lord Jesus.

“6. Your glorying is not good. Know ye not that a little leaven leaveneth the whole lump?

“7. Purge out therefore the old leaven, that ye may be a new lump, as ye are unleavened. For even Christ our passover is sacrificed for us:

“8. Therefore let us keep the feast, not with old leaven, neither with the leaven of malice and wickedness; but with the unleavened bread of sincerity and truth.

“9. I wrote unto you in an epistle not to company with fornicators:

“10. Yet not altogether with the fornicators of this world, or with the covetous, or extortioners, or with idolaters; for then must ye needs go out of the world.

“11. But I have written unto you not to keep company, if any man that is called a brother be a fornicator, or covetous, or an idolater, or a railer, or a drunkard, or an extortioner; with such an one no not to eat.

“12. For what have I to do to judge them also that are without? do not ye judge them that are within?

“13. But them that are without God judgeth. Therefore put away from among yourselves that wicked person.”

Plaintiff says that by the reading of this chapter defendant intended to charge her with being guilty of fornication, to her damage \$10,000. Defendant pleaded the general issue and the One-Year Statute of Limitations, to which pleas a *similiter* and replication were filed.

At the conclusion of plaintiff's proofs the court, on motion of defendant, instructed a verdict in his favor and plaintiff appeals.

From plaintiff's testimony we gather that she has a fertile imagination which leads her to erroneously construe the language and actions of her pastor and

some of the officers of the church and members of its congregation. Certainly, after a most careful reading and weighing of her testimony and her letters produced on cross-examination, we are unable to conclude that any serious or slanderous charges were made against her by defendant, notwithstanding we may be impressed with the fact that plaintiff herself may honestly, though misguidedly, believe that the conclusions she has drawn from her pastor's words and actions are correct. She seems to have been an active church worker in good standing and repute with her pastor and fellow-members until the occurrence of the events which resulted in this action and another which she has brought against her pastor and one Gus Nelson, a trustee of the church, for "conniving" together, as she says, to oust her from membership in the church. At a regular meeting of the church members of either the 10th or 17th of February, 1912, the exact date being in some doubt from plaintiff's proof, and at which meeting she was expelled as a member of the church, no word was said, as appears from the averments of the declaration or the testimony of plaintiff, which constitute actionable slander. Plaintiff on cross-examination testified that the only reason she had to think that defendant slandered her was his reading of the chapter from the "Corinthians" set out *in liacc verba* in this opinion. It would seem to us that the purpose of defendant's reading of this chapter was to convey to the members present the fact that there was biblical authority for putting a member out of the church. The eleventh verse enumerates the offenders with whom Christians should not associate, and from which it may naturally be inferred that if any such there be in the church, they should be put out, not retained to corrupt by their baneful influence the other members. These are the words of the eleventh verse: "But now I have written unto you not to keep company, if any man that is called a brother be a fornica-

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tor, or covetous, or an idolater, or a railer, or a drunkard, or an extortioner; with such an one no not to eat." These are the words of St. Paul to the Corinthians—a Saint of great influence in all the Christian churches, regardless of denominational belief, and an unimpeachable authority throughout Christendom. Plaintiff certainly was not justified in concluding that defendant intended, by the reading of chapter 5 of the First Epistle of St. Paul to the Corinthians, or by any word alleged to have been uttered by him on that occasion, to charge her with being a "fornicator." No word alleged to have been spoken by him on that occasion is susceptible of any such interpretation. We judge from plaintiff's testimony and her letters in evidence that if she was guilty of any of the enumerated offenses, it was not the major one of "fornication," but the minor one of being a "railer;" but even such a conclusion would not be warranted from the proofs found in the record.

It is contended that the words spoken on the occasion on which they were uttered constituted a privileged communication, and that in order for plaintiff to recover she must prove that express malice incited their utterance. We think that the matters concerning plaintiff were under inquiry at a regular meeting of the congregation, and that the words there spoken by the defendant as the pastor of the church and as presiding officer of the meeting were in the line of his duty and were privileged and not actionable unless the ingredient of express malice entered into them. As to the presence of malice, the record is silent. The occasion will not justify any inference of malice—not even the slight malice argued by counsel for plaintiff as being sufficiently present to impel the learned trial judge to submit the cause to the jury. In the condition of the proofs at the conclusion of plaintiff's case the questions of privileged communication and malice were questions of law for the judgment of the court

and not of fact for the determination of the jury. The action of the learned trial judge in instructing a verdict for defendant was right.

The meeting at which defendant is alleged to have uttered the slanderous words complained about was one of the regular meetings of the church members, and the matters discussed at that meeting related to the government of the church and the discipline of the plaintiff member, at which meeting the defendant, as pastor, was the regular presiding officer, and what he said and did there were within the line of his duties; therefore the words uttered were clearly privileged. The question of the discipline of plaintiff was properly before the meeting, and defendant, as the pastor of the church, had the right to say the things he did about and concerning plaintiff if he believed in their truth and said them from a sense of duty in order to aid the members of the church in determining whether plaintiff should be retained as a member or dismissed. *Everett v. DeLong*, 144 Ill. App. 496.

We think that the text in Newell on Slander, sec. 567 (3rd Ed.) is applicable to the facts in this record, where the author lays down the following rule:

“If, however, the occasion is one of qualified privilege only, the burden is cast upon the plaintiff of proving actual malice on the part of the defendant, and if he gives no such evidence, it is the duty of the court to nonsuit him or to direct a verdict for the defendant.” *McDavitt v. Boyer*, 169 Ill. 475.

We think the declaration is obnoxious to a demurrer, for the words spoken and the occasion of their utterance, which fully appear in the declaration, do not constitute actionable slander.

The judgment of the Circuit Court being without error, is affirmed.

Affirmed.

George J. Sayer, Appellee, v. Andrew J. O'Connell, Appellant.

Gen. No. 21,928. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 14, 1916.

Statement of the Case.

Action by George J. Sayer, plaintiff, against Andrew J. O'Connell, defendant, to recover rent.

The Municipal Court entered a judgment by confession for rent and attorney's fees, under a power contained in a lease set forth in the statement of claim, in favor of plaintiff and against defendant for the sum of \$1,181. Defendant afterwards made a motion to vacate the judgment on the single contention and claim that the court had no jurisdiction to enter it. No affidavits were filed in support of this motion and no claim made of meritorious defense to the amount of the judgment or any part of it.

Defendant grounded his motion upon the fact that in the statement of claim it is recited that the lease containing the power of attorney authorizing the confession of judgment was lost or mislaid. It appeared by an averment in the statement of claim that a sworn copy was filed in its place and this fact was not denied by defendant. It was further set forth in the statement of claim that the copy of the lease attached to such statement had been admitted by defendant in another action between the same parties to be an exact duplicate of the original lease; and it was also admitted by defendant that the original lease was executed by him. Plaintiff also averred in his statement of claim that the said lease had never been assigned

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or transferred to any other person. The trial judge denied the motion to vacate, and defendant appeals.

FULTON, GAREY & DEUTSCHMAN and D. T. ALEXANDER,
for appellant.

STEIN, MAYER & STEIN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 11*—*when validity presumed.* On appeal, where the evidence shows that the judgment appealed from was entered in open court, all presumptions in favor of its validity must be indulged.

2. JURISDICTION, § 38*—*when not affected by loss of instrument in suit.* A court is not without jurisdiction to render a judgment for rent because the original lease is lost or mislaid where a sworn copy is introduced, especially where such copy is admitted by defendant to be a true copy.

William Rauen, Appellee, v. Andrew Benson, Appellant.

Gen. No. 21,967.

MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim insufficient.* A statement of claim in an action of the first class in the Municipal Court of Chicago, the material averments of which are that "plaintiff's claim is for the value of goods appropriated by defendants of the kind and value as follows," setting out thereafter a list of certain personal property, is insufficient in that it does not state a cause of action cognizable by the courts under settled rules of procedure.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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term, 1915. Reversed and remanded. Opinion filed February 14, 1916. Rehearing denied February 28, 1916.

BENTLEY, BURLING & SWAN, for appellant.

GEORGE REMUS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Appellant brings the statutory record in this case to this court for review. Appellee has failed to appear or favor us with brief or argument.

Judgment was rendered upon the finding of the court in favor of appellee against appellant for \$663, and appellant says that the amended statement of claim under which the cause went to trial does not state a cause of action. This case is one of the "first class" under the Municipal Court Act and is a "contract claim."

The material averments of the statement of claim are that "plaintiff's claim is for the value of goods appropriated by defendants of the kind and value as follows"—setting out a list of certain personal property alleged to be of the aggregate value of \$1,744.60. This is not the statement of a claim resting either in contract or tort. No contractual relation is stated to exist between the parties and nothing is alleged which in law constitutes a tort. If the statement of claim defectively set forth a cause of action, the finding and judgment of the court would be a sufficient curative. But where the statement found in the record fails, as does this, to state any cause of action, no subsequent proceeding, finding or judgment will aid it. On such a statement nought can be predicated, as it presents nothing upon which any presumption can be based. While the statement need not state a cause of action "with the particularity required at common law," still it must state some cause of action cognizable by the

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courts under settled rules of procedure. *Gilman v. Chicago Railways Co.*, 268 Ill. 305, and *Walter Cabinet Co. v. Russell*, 250 Ill. 416, amply sustain the foregoing legal conclusions.

The judgment of the Municipal Court is reversed and the cause is remanded.

Reversed and remanded.

Royal Colliery Company, Appellee, v. Alwart Brothers Coal Company, Appellant.

Gen. No. 20,844. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed February 16, 1916. Rehearing denied March 15, 1916.

Statement of the Case.

Action by Royal Colliery Company, a corporation, plaintiff, against Alwart Brothers Coal Company, a corporation, defendant, to recover the value of certain coal sold by plaintiff to defendant. From a judgment for plaintiff for \$1,155, defendant appeals.

The evidence showed that plaintiff was in the business of mining and shipping coal, having its mines at Virden, Illinois. Defendant was a coal dealer in the City of Chicago, and had a contract with the board of education to supply part of the coal used in the Chicago public schools. On the 25th day of July, 1911, plaintiff and defendant entered into a written contract whereby plaintiff agreed to sell, and defendant agreed to buy, approximately 20,000 tons of lump and egg coal at a price of \$1.07½ per ton at the mines; said

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coal to be shipped in approximately equal quantities (about 2,500 tons per month) between the date of the contract and March 31, 1912, as ordered, and payments to be made at Virden on the 20th of each calendar month for fifty per cent. of all coal shipped during the previous month; the balance to be paid for on the 10th of the second month following shipment.

In January, 1912, there arose between the parties some difficulty with reference to this contract. During the period that the school coal contract had to run, defendant needed certain coal known as "washed coal," however, the transaction for washed coal was to be considered separate and apart from the transactions involving the school coal contract. It was also understood that payment for the washed coal was to be made on the 10th of the month following shipment.

The evidence is undisputed that there was furnished by plaintiff to defendant washed coal as set forth in its statement of claim, amounting to \$1,485.37, and that the coal represented by the first item was delivered on February 20, 1912.

During January, 1912, there was delivered to defendant on the school coal contract, coal valued at \$1,817.08. Under the terms of the school coal contract there was due on February 20th the sum of \$908.54. There was also due at this time \$268.11 for washed coal delivered in January.

On February 20th defendant sent plaintiff a voucher check for \$1,100, which voucher check stated that it was a payment "on account." This check was received by plaintiff and was paid in due course.

On June 15, 1912, defendant sent a voucher check to the plaintiff for the sum of \$376.40. This voucher check had on its back the following memoranda:

"3/26 Bill rend.	\$1209.72
3/7 Bill rend.	121.66
2/20 Bill rend.	133.99
	<hr/>
	1485.37

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1911	Cr.			
10/5	Cr. memo.	139	4.49	
26	Cr. memo.	144	13.92	18.41
				<hr/>
				1503.78
1911				
11/3	Cash		27.38	
1912				
2/21	Cash		1100.00	1127.38
			<hr/>	<hr/>
				376.40''

This check was received and deposited by plaintiff and paid. It will be seen that the defendant in the voucher check applied the \$1,100 payment of February 20th on the washed coal account.

It further appeared from the evidence that after the beginning of this suit, plaintiff, on October 15, 1912, began an action against the defendant in the United States District Court, in which suit plaintiff filed the ordinary common counts, alleging damages in the sum of \$5,000. Defendant pleaded the general issue. That suit arose out of a controversy with reference to the school coal contract. After suit was begun in the United States District Court by plaintiff, defendant began an action in the Municipal Court of Chicago to recover damages which it claimed to have sustained because of plaintiff's failure to fulfil the school coal contract. This cause was removed to the United States District Court and the two cases were tried together.

Defendant claimed that in the trial of these two cases in the United States District Court, plaintiff admitted that the \$1,100 paid on February 20th was applied on the washed coal account and not on the school coal contract; that according to plaintiff's accounts, there submitted in evidence, the \$1,100 payment was not applied by plaintiff on the school coal contract; that all the coal ordered and delivered previously to Jan-

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uary had been paid for; that no coal was ordered under the school coal contract February 20th, and therefore plaintiff in that case was suing for only the coal ordered and sold during the months of January and February; that there was due for said coal not to exceed \$3,523; that there was proven in that case damages not to exceed \$1,200; that the interest due on any theory of the case could not have been more than \$175, making a total of \$4,898; that therefore the verdict for \$5,081.95 rendered in the United States District Court proceeding could have been arrived at only on the theory that the \$1,100 payment in question had not been applied on the school coal contract; that the judgment entered on said verdict was *res adjudicata* of that fact; that with the elimination of that question here, there was no further issue to be determined, consequently plaintiff had no cause of action, as the payment of \$1,100 and the check for \$376.40 constituted full payment of the amount due for washed coal, the subject-matter of the present suit.

Plaintiff contended that its suit in the United States District Court was not for the value of said coal at the contract price, but for the market value thereof, together with damages for defendant's failure to order coal in quantities provided for in the school coal contract, during the months prior to January; that it based its right to a recovery for damages upon an alleged breach of the contract by defendant; that the \$1,100 payment was applied by it on the school coal contract, and that the jury in the United States District Court proceeding so found.

In support of their respective contentions, both parties introduced testimony as to the proceedings in the United States District Court, not only as to the evidence there offered, but also the rulings of the court thereon, the pleadings and the instructions to the jury. This testimony was given by the respective attorneys who represented the parties in the litigation

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both in the United States District Court and in the proceeding at bar.

It appeared from the evidence that the testimony in the proceeding in the United States District Court showed that up to February 20th about 7,500 tons of coal had been delivered to defendant under the school coal contract, 3262.02 tons of which were furnished between January 12th and February 20th; that on February 20th defendant demanded that the balance of the coal due under the school coal contract (12,500 tons) be delivered during the remainder of the contract period, viz., by April 1; that upon plaintiff's refusal to comply therewith, defendant declined to order any more coal from plaintiff; that plaintiff claimed that the failure to order coal as provided for under the contract, at the rate of 2,500 tons per month, constituted a breach of the contract, by reason of which breach plaintiff had the right to recover any damages suffered as a result thereof, also for the coal delivered during January and February, on the basis of the market value, and not upon the contract price.

The evidence further showed that in the course of the trial in the United States District Court it appeared that after this contract had been entered into, the price of coal declined to a figure below the price therein provided for, during the months of August, September and October; that during said period, defendant's orders fell considerably below the monthly quota; that during November, when the price of coal rose above the contract price, defendant ordered 2,000 tons—nearly the full quota; that during December, when the price again declined, defendant ordered only 1,000 tons; that during January and February, 1912, when the weather became cold, the price of coal advanced sharply; that because of defendant's failure to order coal as contracted for, plaintiff had made certain contracts with other people, so that when defendant ordered in larger quantities in January, the plaintiff,

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by reason of these emergency contracts, was unable to commence deliveries to defendant until January 12th; that the amount of coal delivered from January 12th to February 20th was practically on a basis of 2,500 tons per month.

It appeared further from the evidence in the case at bar that in the suit in the United States District Court, defendant's statement of claim in the Municipal Court of Chicago was introduced, showing the market price of coal during January and February was \$2 and \$1.75 per ton, respectively; that plaintiff introduced evidence showing the market price day by day; that defendant claimed the market price of coal during January and February ranged as follows:

"January	10 to 16	.....	\$2.25 per ton
do	16 to 25	.....	1.75
do	25 to 31	.....	1.78
Feby.	2 & 3	.....	1.90
do	4 to 9	.....	1.65
do	10 to 19	.....	1.95
do	19 & 20	.....	1.60"

It further appeared that in the United States District Court, Paul J. Alwart, secretary of the defendant company, testified that the payment of \$1,100 was originally intended as payment of the \$908.54 due February 20th for January coal deliveries under the school coal contract, and an item of \$268.11 due for washed coal, but that later, viz., in June, he applied the entire amount in payment of the sum due for washed coal, and that plaintiff acquiesced in such action. It further appears that defendant based its claim for the application of the \$1,100 on the washed coal account, upon the fact that the voucher check for \$376.40 showed that the \$1,100 was applied by defendant to the payment of all washed coal. This was also testified to by Mr. Alwart in the case at bar.

It further appeared that in the United States District Court proceeding there was evidence that the

washed coal account was separate from the school coal contract, and that plaintiff and defendant had agreed that the washed coal account be taken care of independently of any difficulties arising with reference to the school coal contract; that A. J. Maloney, vice president of the plaintiff company, testified that the \$1,100 was applied on the amount due for coal delivered in January on the school coal contract, and on the washed coal delivered in January; that afterwards (in May) the defendant, by separate check, paid for the washed coal delivered during January, whereupon the entire sum of \$1,100 was applied on the amount due on the school coal contract. It further appeared that in the United States District Court proceeding, the question whether or not the contract had been breached was one of fact, and that the jury were instructed that if they believed from the evidence that the contract had been breached, plaintiff might recover the market value of the coal sued for.

On this state of the record, defendant contended: First, that its voucher check for \$376.40 was tendered to plaintiff as a payment in full for the washed coal in question, this contention being based upon the fact that the voucher check contained on the back the memoranda set forth above; that plaintiff, by accepting this check acquiesced in the application of the \$1,100 to the payment of the amount due on the washed coal account; that, in fact, the giving of this voucher check and the acceptance thereof constituted an agreement on the part of plaintiff to accept this check in full for the washed coal. And counsel for defendant argued that under the facts, the court should have held as a matter of law that this constituted a contract.

Defendant also maintained that the jury in the United States court proceeding had determined as a matter of fact that defendant had not been credited with the sum of \$1,100 on the amount due under the

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school coal contract, but on the contrary, that the jury by their verdict had found that plaintiff had applied said \$1,100 in payment of the amount due on the washed coal account; that therefore such "essential fact having been determined by a court of competent jurisdiction may not be again passed on by another court in litigation between the same parties."

Defendant contended that, under the facts in evidence in the case at bar, it appears conclusively that the verdict of the jury (in the United States District Court proceeding) can only be reconciled with the theory that the plaintiff had not applied the \$1,100 to the school coal contract.

JOHN A. McKEOWN, for appellant.

FRANK CROZIER, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. PAYMENT, § 36*—*when transfer of payment to different account not implied as matter of law.* The acceptance of a check which bears on it an indorsement stating that a previous payment had been made on a specified one of two accounts between the parties does not, as a matter of law, constitute an agreement that such application shall be made of the prior payment which had been previously credited to the other account, but the question as to whether such agreement arose is one of fact for the jury.

2. PAYMENT, § 29*—*when evidence sufficient to support finding as to application.* Evidence examined and held sufficient to support finding as to agreement as to application of payment.

3. ESTOPPEL, § 16*—*when question of estoppel by verdict for jury.* The question as to whether or not there is an estoppel by verdict is for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry Finkelstein, Plaintiff in Error, v. Illinois Central Railroad Company, Defendant in Error.

Gen. No. 20,439.

1. CARRIERS, § 248*—*when evidence sufficient to show written contract for carriage of live stock.* In an action by a shipper of live stock against the carrier to recover for injuries alleged to have been caused to the stock by defendant's negligence, plaintiff's evidence examined and held to show that a written contract for the carriage of the stock had been entered into.

2. CARRIERS, § 248*—*when introduction in evidence of written contract for carriage of live stock essential.* In an action by a shipper of live stock against the carrier to recover for injuries alleged to have been caused to the stock by defendant's negligence, where it appears from plaintiff's evidence that a written contract had been entered into for the carriage of the stock, it is incumbent upon plaintiff to introduce the contract in evidence.

3. CARRIERS, § 248*—*when duty to introduce whole of written contract not relieved.* In an action by a shipper against a carrier of live stock to recover for injuries to stock, where it appears from plaintiff's evidence that he entered into a written contract with defendant, and plaintiff offers to introduce only a part thereof not showing a contract, plaintiff's contention that he is relieved from the duty of introducing other parts of the contract because he had not read and did not know of nor assent to the conditions contained in such parts, cannot be sustained, but the whole contract must be introduced, and if defendant introduces evidence showing that any of its provisions preclude recovery, plaintiff must introduce evidence showing the inapplicability of such provisions.

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916. Rehearing denied March 3, 1916.

Statement by the Court. This is a suit to recover damages sustained by plaintiff in error (plaintiff below), by reason of the alleged negligence of the defendant in error (defendant below), in the shipment of horses and mules over the defendant's line or road.

Plaintiff's statement of claim alleges that one mule

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and two horses, the property of the plaintiff, were shipped from Assumption, Illinois, on or about May 11, 1912, to Chicago, Illinois, arriving at their destination May 13th; that the damages were incurred because of unreasonable delay in the transit of the said property; and that the amount of said damage was in the sum of one hundred and fifty dollars.

In the affidavit of merits, defendant denied that it was guilty of negligence or any unreasonable delay in the handling of the shipment in question; that the damage, if any, was due to the viciousness of the animals and the manner in which they were loaded into the car by plaintiff, who was charged with the loading thereof, and not to any negligence on its part; and further alleged that a written contract had been entered into with reference to said shipment; that under said contract the liability of defendant, if any, was limited; and that the valuation set upon the stock alleged to have been injured was in excess of the amount set forth in said contract; furthermore, that said contract provided that no claim for loss or damage should be valid against defendant unless such claim be put in writing, verified, and delivered to the general freight agent of the defendant company, or to the agent of defendant at the station from which the shipment was made, or to the agent at the point of destination, within ten days from the time said shipment was removed from said car; and that plaintiff failed to give such notice, wherefore he could not maintain his action.

Upon the trial below a jury was waived and the cause submitted to the court for trial. The court found the issues for the defendant, at the close of the plaintiff's case, and entered judgment for costs against the plaintiff; to reverse which plaintiff has prosecuted this writ of error.

EUGENE L. GAREY and ARCHIE J. DEUTSCHMAN, for plaintiff in error; FRANK D. FULTON and JOHN M. RANKIN, of counsel.

VERNON W. FOSTER and CALHOUN, LYFORD & SHEEAN, for defendant in error; J. G. DRENNAN, of counsel.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

In urging a reversal, plaintiff contends that the evidence on behalf of plaintiff shows a prima facie case of common-law liability. In support of said contention he insists that he has proven: "*First*, delivery of the horses to the defendant in good condition at Assumption, Illinois; *second*, filling instructions to the carrier of the consignee and destination; *third*, the reasonable and customary time required for such transit by the carrier; *fourth*, a longer period of time for the transportation of the horses than such usual and customary time; *fifth*, arrival of horses at destination in damaged condition; and *sixth*, amount of damage, if any, suffered by plaintiff as a result thereof."

It is true plaintiff did show these facts, and if those were the only facts shown, plaintiff's contention would be tenable. Defendant, however, in its affidavit of merits, asserted that there was a written contract between plaintiff and defendant, containing certain provisions, among which was the one with reference to filing claim within ten days, of loss or damage suffered, which, not having been complied with by plaintiff, prevented a recovery. Plaintiff contends, however, that there was no written contract entered into by him; that because the provisions contained therein were not read by him, were not called to his attention by defendant, and were not assented to by him, therefore he was not bound by them.

Plaintiff stated in his testimony that at the time he made the shipment in question, the defendant's agent at Assumption, the initial point of shipment, said, "sign your bill;" that he signed it, and "he gave me a contract, and I went away." Repeatedly in the course of his testimony plaintiff used the word "con-

Finkelstein v. Illinois Central R. Co., 198 Ill. App. 75.

tract," and counsel for plaintiff offered the contract at the time of the trial, for the purpose of showing the initial point of shipment and the destination. Defendant objected, insisting that the entire contract be placed in evidence. At this time it was practically admitted by defendant that the initial point of shipment was Assumption and the destination was Chicago, Illinois; whereupon counsel for plaintiff said, "All right then, we will not offer it." Later on, after cross-examination of plaintiff had been completed, his counsel made the following offer:

"I offer that portion of the *contract*, showing the initial point, Assumption, showing the destination Chicago, Illinois, the consignee and the consignor, showing the number of horses and the number of the car."

On objection being made, the court sustained the objection, on the ground that the entire written contract should be introduced in evidence.

It furthermore appeared from the evidence that plaintiff had been in the habit of making two or three shipments per week for a period of about four years, and that he had entered into more than four hundred transactions identical with the one in question. Plaintiff also testified that he never read any of the contracts, although they were signed by him, and that his attention was never called to the contents thereof.

While plaintiff contends that the number of times he made shipments, and the circumstances in attendance cannot be considered as rebutting the positive testimony that he had not read these contracts, and had no knowledge of their contents, so as to be bound thereby, and while defendant contends to the contrary, it is not necessary for us to determine that issue, because that contention does not go to the question whether or not there was a contract but to the question whether or not plaintiff was bound by it.

The real question in this case is, whether or not from the evidence offered by plaintiff, it appeared that

a written contract had been entered into. If so, under the ruling in *Kitza v. Oregon Short Line R. Co.*, 169 Ill. App. 609, and in *Burtless v. Oregon Short Line R. Co.*, 180 Ill. App. 249, it was incumbent upon plaintiff to offer the written contract in evidence, and if necessary because of evidence offered by the defendant as to the application of any provisions therein precluding a recovery, then to introduce evidence, if any there was, to show why the provisions in said contract relied upon by defendant to defeat a recovery did not control. *Wabash R. Co. v. Thomas*, 222 Ill. 337.

As already stated, plaintiff said he signed a paper, which he repeatedly designated as a contract; plaintiff's counsel repeatedly referred to this paper as a contract. Counsel also used the language heretofore quoted:

"I offer that portion of the contract, showing the initial point, Assumption, showing the destination Chicago, Illinois, the consignee and the consignor, showing the number of horses and the number of the car."

The reason counsel gave for offering only so much of the contract was that the other conditions therein were not binding, because under the testimony of the plaintiff, he had never read them, they were unknown to him, his attention had never been called to them, that therefore he could not be said to have assented thereto. But that was a conclusion to be arrived at not by counsel or by the plaintiff, but by the court, and the court could not arrive at any conclusion unless the contract was in evidence.

The contract itself appears in the record in this case and is marked "Plaintiff's Exhibit 1," for identification. This record was prepared by counsel for plaintiff, and the contract can have been placed in the record only to show that it contained that part which was offered in evidence the refusal of which is assigned as error. From the record in this case it is clear that there was a written contract. Whether or not all the conditions in said contract were binding whether or not

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the limitations contained therein were contrary to the law of our State, were questions to be determined by the court, sitting both as court and jury. But in the absence of the contract he could not pass thereon.

Plaintiff contended during the oral argument before this court, and, inferentially at least, in his brief, that he could offer any portion of the contract he desired, and if defendant wished to have the benefit of any other part of the contract, he had the privilege of introducing it in evidence, and that it was not plaintiff's duty to do so. Counsel refers us to cases wherein portions of letters or records of title were offered in evidence and objection was made that the entire letter or record should have been offered in evidence, but the court held that the party might offer such part of letter or record as he desires, and the other party, if he desires the benefit of the whole letter or record, might then offer it in evidence. However, in those cases it was not a question of a written memorandum indicating a contract either in part or entirely, but such memorandum or the part thereof which was offered was simply evidence in corroboration or contradiction of the various contentions of the parties.

Counsel, on this phase of the case, place considerable reliance in the case of *Gemberling v. Grand Trunk Western Ry. Co.*, 192 Ill. App. 53. In that case the plaintiff produced a bill of lading that had been issued by the defendant to the plaintiff, and offered in evidence only the face of it. Objection was made that the plaintiff should introduce the entire bill of lading, including certain printed conditions on the back thereof. The court, however, permitted the plaintiff to introduce only the face of it. The defendant excepted to the ruling, but did not offer at any time to introduce the back of it. We upheld the ruling of the court below, and stated that defendant had the right to introduce said portion if it saw fit.

However, the facts in that case were quite different

from those in the case at bar. There the court admittedly had before it a written instrument. The face of the bill of lading was a complete written contract in itself, or a written receipt of the shipment for transportation, and under our authorities it could be either or both. The written conditions on the back, as far as the evidence in that case showed, were not necessary to the interpretation of the face of the bill, and if they in any way limited the right of recovery as established by the face of the bill of lading containing the same, either as a contract or a receipt, or both, then it remained for the defendant to offer the same and show that under the law he was entitled to the benefit of such limitation. But such was not the situation in the case at bar. The written contract itself was not offered in evidence, but only "that portion of the contract, showing the initial point, Assumption, showing the destination, Chicago, Illinois, the consignee and the consignor, showing the number of horses and the number of the car." These facts in themselves did not establish a written contract or a written form of receipt. Moreover, these facts had already been proven in the case, and in fact were not denied in the affidavit of merits. Therefore, the offered portion of the contract was not necessary for that purpose. The facts in the case at bar make the case of *Gemberling v. Grand Trunk Western Ry. Co.*, *supra*, inapplicable, and plaintiff's counsel refer us to no case wherein the facts and the law support his contention.

As stated above, the evidence shows very clearly that the contract between these parties was in writing, and that it was not offered in evidence. Plaintiff could not recover on an oral contract when the evidence showed a written contract existed. Therefore, the court did not err in finding the issues for the defendant.

For the foregoing reasons, the judgment will be affirmed.

Affirmed.

Cox v. Rhodes Avenue Hospital, 198 Ill. App. 82.

Anna Cox, Defendant in Error, v. Rhodes Avenue Hospital, Plaintiff in Error.

Gen. No. 20,708. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Action of trespass on the case by Anna Cox, plaintiff, against Rhodes Avenue Hospital and Dr. Frank Deacon, defendants, for the recovery of damages for the alleged wrongful detention amounting to false imprisonment in the hospital conducted by defendant company. During the trial Dr. Deacon was dismissed from the case and the trial proceeded against the hospital company alone.

In the amended declaration it was alleged that defendants were operating the Rhodes Avenue Hospital for profit; that plaintiff was a patient therein for reward; that she was recovering from the effects of a serious major operation which had been performed at the hospital; that on April 9, 1912, she was discharged from further hospital treatment by her surgeon, with permission to leave the hospital and return home; that she was in a weak and highly nervous condition, due to said operation, but that she was physically able to leave said hospital, and attempted to do so; that defendants, disregarding their duty on said date, demanded that before plaintiff be permitted to leave the hospital she sign a promissory note for the sum claimed due defendants from plaintiff, for accommodation as a patient in said hospital; that said note contained a warrant of attorney authorizing confession of judgment; that defendants informed plaintiff that

unless said judgment note were signed she could not leave the hospital; that thereupon defendants wrongfully and oppressively detained her in said hospital, without probable or reasonable cause, for the space of three hours, contrary to the laws of the State and against the will of the plaintiff; that during said unlawful restraint, defendants applied threats and vile epithets to the plaintiff, by reason of which premises plaintiff was frightened and rendered hysterical and her weak condition aggravated, and her recovery from the effects of said operation greatly retarded; furthermore, that plaintiff was exposed to disgrace and injured in credit and circumstances, whereby she suffered damages to the extent of \$5,000. There was a second count in the amended declaration, which the court instructed the jury to disregard. To this declaration a plea of general issue was filed.

On the trial of the case before the court and jury, a verdict for \$775 was returned, upon which judgment was rendered, to reverse which defendant has prosecuted this writ of error.

Plaintiff testified that she entered defendant's hospital on March 22, 1912, to submit to a comparatively minor operation; that at that time she gave to Dr. Hertel, her surgeon, \$30, for which she was given a receipt by defendant; this \$30 was to pay for one week's accommodation at the hospital; that she was taken to the operating room on the 23rd, but was not then operated on because it was discovered she had other ailments; that on the 25th she was informed that she was suffering with a tumor; that on the 27th she was operated on for fibroid tumor, appendicitis, hemorrhoids, and cyst of the ovary; that because of these operations she was compelled to stay at the hospital longer than the time she had paid for; that on April 9th she was informed by Dr. Hertel that she was physically fit to leave the hospital; that about five o'clock p. m. on the same day she was presented, by one of the

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nurses, with a bill for \$82, hospital charges; that her physician also told her that if the bill was not paid she would have trouble with the hospital; that he then handed her a judgment note for \$82 which he requested her to sign and which she refused to execute; that at the time the bill was presented, she had but two or three dollars in her possession and that she informed the nurse that she could not pay her bill then because she was unable to get any money until she could go to the bank; that she had arranged for a taxicab to call for her that evening at six o'clock; that she was later informed that the taxicab was there for her and she was asked whether she had signed the note and was told that unless it was signed she would not be permitted to leave the hospital; that she requested that the chauffeur be sent to her room, but was informed that he would not be allowed to come into the building; that she then went to the window of the building and threw a dime to the chauffeur who was standing outside, to telephone her sister that she was being detained and could not come home; that at eight o'clock that same evening a lawyer by the name of Terwilliger, at the request of plaintiff's sister, came to the hospital; that when he came, he picked up her suitcase and walked out of the room towards the stairs; that they were met there by the night nurse, and were told that she had orders from the office not to let her go; that she was, however, permitted to go downstairs so the matter might be discussed at the office; that there again a talk was had with the cashier who demanded that plaintiff either pay the bill or sign a note for the amount; that finally Mr. Terwilliger stated that she could not be held at the hospital for the payment of that debt, and that she would pay same as soon as she was able to do so; that while such conversation took place, someone, whom she believed to be Dr. Deacon, remarked that plaintiff did not want to pay her bill because she was a crook; that after a little more col-

loquy the door was unlocked and plaintiff and Mr. Terwilliger went home. Plaintiff further testified that she was in a weak, hysterical condition thereafter; that she required assistance down the stairs and to her taxicab; that thereafter she continued to be in a weak and hysterical condition as a result of the acts of the defendant and that she was not able to do any work for six months after she returned home from the hospital.

Mr. Terwilliger was also called as a witness, and corroborated the statements of the plaintiff as to what occurred while present, and what he did. Also, that when he came to plaintiff's room in the hospital he found plaintiff in a hysterical condition and that he had to assist her out of the hospital to the taxicab.

The chauffeur corroborated the testimony of the plaintiff as to notifying her sister that she was being held at the hospital, and that he was not permitted access to the plaintiff and that he was ordered to take his machine from in front of the hospital; that at the time plaintiff entered his car she appeared to be in a weak condition and looked as though she had been crying.

Another witness, Dr. Harpole, stated that he saw plaintiff on the day after she returned home; that he found her in a weak and highly nervous condition; that the occurrence at the hospital as related by the plaintiff would have a tendency to retard her recovery from the effects of the operation which had been performed on her.

On behalf of the defendant, Dr. Deacon testified that he knew nothing about the occurrence aforementioned, because he was not present. Dr. Hertel, testifying on behalf of the defendant, also stated that he knew nothing of the alleged altercation relative to the promissory note, and that there were no threats made against plaintiff in his presence. He did state, however, that he told plaintiff that she would better settle the bill

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and save trouble. He also testified that plaintiff was in a highly nervous condition before entering the hospital, and that upon leaving it she was in better condition than at the time she entered it, and that at the time of the trial she looked better and weighed more than at the time prior to the operation.

Another witness for the defendant, the supervising nurse at the hospital, testified that plaintiff was not detained against her will; that there were no locks on the doors of the patients' rooms; that Dr. Deacon was not there at the time in question; that no one called plaintiff names; that when plaintiff was asked to pay her bill she became hysterical; that plaintiff said she would not pay it; that she also complained about Dr. Hertel and threatened to sue him; that plaintiff used the telephone that evening at 6:30; that she had never heard of plaintiff's alleged detention or the altercation relative to the judgment note before the suit was started.

Another witness for the defendant, one of the nurses at the hospital, testified that she never made any threats concerning plaintiff; that nobody present made any threats; that plaintiff was not asked to pay her bill or sign a note; that she saw plaintiff walking about the building along the corridors, between 5:30 and 7 o'clock in the evening; that the doors were never locked, and that plaintiff was not detained.

EUGENE STEWART, for plaintiff in error.

W. TUDOR AP MADOC, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. FALSE IMPRISONMENT, § 2*—*when physical and forcible detention not essential.* In an action of trespass on the case to recover damages for the alleged wrongful detention of plaintiff,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

amounting to false imprisonment, in a hospital conducted by defendant company, it is not essential to a recovery that plaintiff should have been physically and forcibly detained by defendant, but conduct of defendant of such character as to make plaintiff, in her then condition, believe that if she attempted to leave the hospital she would be forcibly detained, constituted a wrongful detention against her will.

2. FALSE IMPRISONMENT, § 29*—*when question of wrongful detention one of fact.* In an action of trespass on the case to recover damages for the alleged wrongful detention of plaintiff, amounting to false imprisonment, in a hospital conducted by defendant, evidence examined and *held* to present a question of fact for the jury as to whether plaintiff had been wrongfully detained against her will.

3. FALSE IMPRISONMENT, § 28*—*when evidence sufficient to support verdict.* In an action of trespass on the case to recover damages for the alleged wrongful detention of plaintiff, amounting to false imprisonment, in a hospital conducted by defendant company, evidence examined and *held* sufficient to support a verdict for plaintiff.

4. FALSE IMPRISONMENT, § 30*—*when instructions properly given.* In an action of trespass on the case to recover damages for wrongful detention, amounting to false imprisonment, instructions examined and *held* properly given.

5. APPEAL AND ERROR, § 1561*—*when refusal to give instruction harmless.* Refusal to give an instruction requested by defendant is harmless error where as much of the instruction as was applicable to the facts had been covered by other instructions given at defendant's request.

6. EVIDENCE, § 74*—*when conversations with third persons admissible.* Evidence of conversations of plaintiff with others held outside of the presence of representatives of the corporation defendant are admissible when part of the *res gestæ*.

7. APPEAL AND ERROR, § 1691*—*when error in examining witness waived.* In an action against a corporation defendant, any error of counsel for plaintiff in asking a question of a witness, who was the superintendent of defendant and in actual control of its affairs, is waived where the witness insisted upon answering after objection thereto was sustained and such action of the witness was concurred in by counsel for defendant.

8. FALSE IMPRISONMENT, § 34*—*what damages recoverable.* In an action of trespass on the case to recover damages for wrongful detention, amounting to false imprisonment, punitive as well as actual damages are recoverable.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9. FALSE IMPRISONMENT, § 29*—*when amount of recovery a question for jury.* In an action of trespass on the case to recover for wrongful detention, amounting to false imprisonment, the question of damages is for the jury.

10. FALSE IMPRISONMENT, § 37*—*when damages not excessive.* In an action of trespass on the case to recover for wrongful detention, amounting to false imprisonment, verdict for \$775 held not excessive.

**The People of the State of Illinois, Defendant in Error,
v. Henry Jacoby, Plaintiff in Error.**

Gen. No. 20,817. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Information by the People of the State of Illinois charging Henry Jacoby with petit larceny. A jury having been waived, the trial proceeded to hearing before the court alone, who found defendant guilty as charged, and sentenced him to the House of Correction for three months and to pay a fine of one dollar and costs.

Defendant seeks a reversal because, as he alleges, there is no proof that he committed the crime of petit larceny as charged.

Defendant makes the further point, that the amended information was defective in that it was not filed until all the evidence had been heard.

J. O. Kuntz, the complaining witness, testified that while riding on a street car at 35th street in the City of Chicago, on September 11, 1914, he suddenly found

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

that his pocketbook was missing; that he saw defendant jump off the car; that he caused the car to stop as soon as possible, and ran back in the direction the defendant had taken; that when he neared the defendant, he saw him "with the pocketbook in his hand; that he grabbed him and said, "Give her here," and that defendant handed him his pocketbook; that he took hold of defendant and inquired for an officer, when one Burgess stepped up and said, "Let me have him," whereupon Kuntz turned defendant over to Burgess, who, the evidence shows, represented himself to be an officer; that a police officer then arrived on the scene, to whom Kuntz related the incident; that he took defendant into custody, and when he found that Burgess had represented himself to be an officer and in fact was not, arrested him also; that Burgess resisted strenuously; that finally, with the assistance of another officer, the two were arrested.

Defendant testified that he resided in the vicinity of 35th street, and at the time in question was crossing the street; that just as he reached the middle of the street, he stooped down and picked up a pocketbook, and just as he did so, Kuntz grabbed him; that the "other fellow came running over—the big fellow that was standing on the corner" (Burgess) and that a struggle followed, and that was all he knew; that he was not riding on any car that day. On cross-examination he admitted knowing Burgess.

Burgess, who also testified, stated that on the night in question he was standing on the corner; that there was a man crossing the street on a run; that "he ran right up to this young fellow here" (defendant); that "it seemed like as if he was stooping down, and he (Kuntz) jumped right on his back and he knocked him down, and then four or five colored fellows came along there, and I went over there and recognized this young fellow (defendant) as being a boy that I knew ever

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since he was a kid;" that he said, "What is the matter?" and defendant replied, "I don't know, this fellow jumped on me;" that he then said, "Let me have him;" that he was merely trying to find out what had happened; that finally defendant said, "Well, it is all right," and that defendant then handed Kuntz something, but what it was he did not know. Burgess also denied having represented that he was a police officer.

LEE, BUCKLEY & MURPHY, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1301*—*when judgment presumed to have been based on competent evidence.* On a trial without a jury it is presumed on a writ of error that the trial court, in entering judgment, considered only the competent evidence.

2. INDICTMENT AND INFORMATION, § 13*—*when delay in filing amended information.* On a prosecution for petit larceny where the crime is sufficiently charged in the original information, it is not a ground for reversal that an amended information was not filed until all the evidence had been heard.

3. CRIMINAL LAW, § 409*—*when point not raised on trial not considered on appeal.* An objection to an amended information that it was not filed until after the evidence had been heard will not be considered on a writ of error when the point was not raised below.

4. LARCENY, § 35*—*when evidence sufficient to support verdict.* On a prosecution for petit larceny, evidence examined and held to support a finding of guilty.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John Ramming, Defendant in Error, v. Charles E. Roland and Thomas Hennessy, Plaintiffs in Error.

Gen. No. 21,030. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Action by John Ramming, plaintiff, against Charles E. Roland, Thomas Hennessy and Frederick Erb, defendants.

Plaintiff's statement of claim was as follows:

"Plaintiff's claim is for labor and materials furnished for carpenter repairs and alterations to the building No. 451 E. 41st street, Chicago, Illinois, done between March 20th and April 20th, 1914, under orders from defendant, Frederick Erb, the contractor, agent and superintendent of the repairs to said building for the owners thereof, viz.: the defendants Charles E. Roland and Thomas Hennessy; that the sum due this plaintiff for said work and material is \$292.29; that the plaintiff caused to be served the notices prescribed by the statute in relation to Mechanic's liens upon the said defendants Roland and Hennessy on April 29, 1914, and April 30, 1914, respectively."

To this statement of claim defendants filed separate appearances and affidavits of merits. Thomas Hennessy denied ownership of the premises, and further, that the statutory notice had been served upon him as set forth in the statement of claim. Charles E. Roland admitted ownership of the premises in question, and further alleged that with reference to the labor and materials sued for, the same was the subject-matter of a contract which he had entered into with one Frederick Erb, and that he did not know of plaintiff's ever having furnished the labor and materials on the premises in question; he further denied

ever having received a notice of lien claim as set forth in plaintiff's statement of claim. Frederick Erb, as a contractor, denied that he ever for himself, as a contractor, entered into an agreement with plaintiff to furnish labor and materials for the carpenter repairs and alterations to the building in question, and further denied that he had a contract for said repairs to said building with the owners thereof.

The record shows that plaintiff dismissed his suit as to defendant Erb, and that the court, trying the case without a jury, found the issues against defendants Roland and Hennessy, and assessed plaintiff's damages in the sum of \$292.29, for which amount judgment was entered, to reverse which defendants Roland and Hennessy prosecute this writ of error.

Defendants, in urging a reversal of the judgment, proceeded upon the theory that plaintiff's action was brought under section 28 of the Mechanic's Lien Act, ch. 82, Hurd's Rev. St. of Illinois for 1911 (J. & A. ¶ 7166). They contended that a recovery by a subcontractor must be against both the owner and the original contractor and the judgment must be a joint one, and furthermore, there must be a proper ten-day notice served upon the owners; that there were no findings by the court, nor recitals in the judgment, of the facts required by our statute, viz., that the owner was indebted to the contractor, and the date from which said lien attached; that in the absence of such findings or recitals, (1) the court erred in entering said judgment, and (2) said judgment is void.

Plaintiff contended that under its statement of claim he might have recovered against all the defendants under the Mechanic's Lien Act, *supra*, if the evidence showed that Frederick Erb, as a contractor, ordered the labor and materials sued for, or against the owners alone, if the evidence showed that the labor and materials in question were ordered by the said Erb as the agent or representative of the owners, Roland and Hennessy.

Ramming v. Roland et al., 198 Ill. App. 91.

BENJAMIN E. COHAN, for plaintiffs in error.

HOLLETT, SAUTER & HENKEL, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 97*—*when statement of claim sufficient to warrant recovery against owners and contractor or owners alone.* In a proceeding under the Mechanics' Liens Act (J. & A. ¶ 7139 et seq.) against the owners and contractor, a statement of claim that plaintiff's claim "is for labor and material furnished for carpenter repairs * * * under orders from defendant, * * * the contractor, agent and superintendent of the repairs to said building for the owners thereof, viz.: the defendants * * *; that the plaintiff caused to be served the notices prescribed by the statute in relation to mechanics' liens upon said defendants * * *," is sufficient to support a recovery against all the defendants, if the evidence showed that the contractor defendant ordered, as a contractor, the labor and materials sued for, or against the owners alone, if the evidence showed that the labor and materials were ordered by the contractor defendant as agent or representative of the owners.

2. MECHANICS' LIENS,—*when issue of fact raised by pleadings.* In a proceeding under the Mechanics' Liens Act (J. & A. ¶ 7139 et seq.) against a defendant alleged to have been the contractor and defendants alleged to be owners, the former, by denying that he entered into a contract with plaintiff and that he had a contract with the owners to furnish such labor and materials, raises an issue of fact, the determination of which bears upon the question whether plaintiff has the right to recover against all of the defendants or against the owner defendants alone.

3. APPEAL AND ERROR, § 1300*—*when submission of evidence on issue presumed.* In a proceeding under the Mechanics' Liens Act (J. & A. ¶ 7139 et seq.) against a defendant alleged to have been the contractor and against defendants alleged to have been the owners, where the former raises an issue of fact by denying that he entered into a contract with plaintiff for the labor and materials and that he had a contract with the owners of the premises to furnish said labor and materials, it will be presumed that evidence was submitted to determine such issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. APPEAL AND ERROR, § 1303*—*when evidence not preserved presumed sufficient.* On a writ of error to the Municipal Court of Chicago, where the evidence upon which the trial court based its judgment is not preserved by bill of exceptions, statement of facts or stenographic report, it will be presumed that evidence offered was sufficient to sustain the court's findings on the issues and its judgment thereon.

5. APPEAL AND ERROR, § 1301*—*when correct application of law to facts presumed.* On a writ of error it is presumed, in the absence of anything in the record appearing affirmatively to the contrary, that the court correctly applied the law to the facts offered in evidence.

Clara Stiefel, Individually and as Administratrix, Appellee, v. Amalgamated Sheet Metal Workers' Local Union No. 73 et al., Appellants.

Gen. No. 21,872. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Appeal dismissed. Opinion filed February 16, 1916. Rehearing denied March 1, 1916.

Statement of the Case.

Bill for specific performance of insurance contract filed by Clara Stiefel, appellee and complainant below, as administratrix of the estate of Abraham Stiefel, deceased, against the Amalgamated Sheet Metal Workers' Local Union No. 73, International Alliance, a corporation, and Thomas Redding, Edgar Ray, B. A. Schooley and Paul Christman. From a decree for complainant, defendants appeal.

After a hearing upon the bill and answers, the chancellor found the issues for complainant and entered a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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decree which incorporated the defendants' joint prayer for appeal, and wherein the appeal was allowed upon the filing by defendants of a bond for \$1,600. The record showed that only three out of the five defendants had signed the bond, although the decree required the bond to be filed by all the defendants, and was entered upon their joint prayer.

Motion was made by complainant to dismiss the appeal for failure on the part of defendants to comply with the prayer for appeal and order thereon.

CRUICE & LANGILLE, for appellants; DANIEL L. CRUICE, of counsel.

BULKLEY, MORE & TALLMADGE, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 16*—*when right of appeal exists.* The right of appeal is purely a statutory one and can be availed of only when allowed by court, and must then be in conformity with the prayer for the appeal and the order of allowance.

2. APPEAL AND ERROR, § 646*—*when appeal not in compliance with prayer or order.* Where the record shows that an appeal was granted upon prayer of all the defendants and the order of appeal required bond to be filed by all the defendants, and it was nevertheless perfected by only three of such defendants, such appeal is not in compliance with the prayer or order, and motion to dismiss must be allowed.

3. APPEAL AND ERROR, § 646*—*when joint defendants must perfect appeal jointly.* Where there were no separate prayers for appeals by individual defendants, and where all of the joint defendants joined in the prayer for an appeal, they must perfect same jointly, regardless of the fact that no substantial rights of several of the defendants were affected by the decree appealed from.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

St. George v. Hamburg-American Line, 198 Ill. App. 96.

A. L. St. George, Defendant in Error, v. Hamburg-American Line, Plaintiff in Error.

Gen. No. 20,416.

1. INNKEEPERS, § 5*—*what is duty and obligation of as to property of guests.* An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests.

2. INNKEEPERS, § 5*—*what constitutes prima facie case in action for value of articles lost.* A prima facie case is made in an action for the value of jewelry lost from a drawer of plaintiff's room, where such plaintiff proves the relation of innkeeper and guest and the loss.

3. INNKEEPERS, § 2*—*when passenger steamer an inn.* A steamer carrying passengers upon the water and furnishing them with rooms and entertainment is for all practical purposes a floating inn, and the owner of such steamer owes the same duties to passengers as does an innkeeper to his guests.

PAM, J., dissenting.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916. Rehearing denied March 2, 1916.

WILLIAM SCHWEMM, for plaintiff in error.

MAXIMILIAN J. ST. GEORGE, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

The defendant in error, hereinafter referred to as plaintiff, recovered a judgment against the plaintiff in error, hereinafter referred to as defendant, for the value of an amethyst brooch, lost while sailing as a first-class passenger on one of the boats of the defendant. The evidence consisted entirely of the testimony of the plaintiff, and was to the effect that the brooch was in daily use during her passage; that she placed it in a drawer in her stateroom one evening, and the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

next morning it was gone. No evidence of any kind was offered on behalf of the defendant.

The law of this State, as laid down in *Rockhill v. Congress Hotel Co.*, 237 Ill. at p. 102, is that: "An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and if the property is lost, all that is necessary to make a prima facie case is to show the relation of innkeeper and guest and the loss."

In *Adams v. New Jersey Steamboat Co.*, 151 N. Y., at p. 167, the New York Court of Appeals held that; "A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations."

The court further points out that cases of steamships are clearly distinguishable from cases involving sleeping car companies and common carriers generally. The reasoning of the Court of Appeals in the foregoing case appears to be sound, and it has been generally accepted as the law. The plaintiff, then, made out a prima facie case, and defendant did not see fit to offer any countervailing proof. In our opinion there is nothing in defendant's other contention that no competent evidence of value was given. The judgment must, therefore, be affirmed.

Affirmed.

PAM, P. J., dissenting.

Snitzler Advertising Co. v. Orr, 198 Ill. App. 98.

**Snitzler Advertising Company, Defendant in Error, v.
Louis T. Orr, Plaintiff in Error.**

Gen. No. 20,483. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Action by Snitzler Advertising Company, plaintiff, against Louis T. Orr, defendant, for money due on account of an advertising contract. From a judgment for plaintiff, defendant appeals.

Defendant was an attorney and organized the Hot Springs Medical Institute and the Orpheum Dental Parlors. He owned one share of stock in each corporation. Plaintiff offered in evidence a note of J. L. Donahue for \$848.25, dated September 10, 1912, payable three months after date to the order of the plaintiff, with interest at six per cent, per annum, and also the following document:

“CHICAGO, May 29, 1912.

“SNITZLER ADVERTISING COMPANY,
Chicago, Ill.

“GENTLEMEN:—

You are hereby authorized to insert advertising for the Hot Springs Medical Institute and Orpheum Dental Parlors for the month of June, which shall not in any event exceed the sum of Seven Hundred and Fifty Dollars (\$750.00) for which we agree to be responsible.

“Yours respectfully,

(Signed) J. L. DONAHUE.

(Signed) LOUIS T. ORR.”

Underneath this appeared the following notation:

“This applies to note of J. L. Donahue for sum of

Snitzler Advertising Co. v. Orr, 198 Ill. App. 98.

Eight Hundred Forty-eight and 25/100 Dollars (Due Dec. 10th, 1912), taken in payment of balance due on account to date Aug. 26th, 1912.

(Signed) LOUIS T. ORR."

The defendant testified that this notation was in his own handwriting, and made by him at the time the note referred to was signed and delivered.

CAVENDER, KAISER & WERMUTH and W. S. HODGES, for plaintiff in error.

PAGE & PAGE, for defendant in error; CECIL PAGE, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. GUARANTY, § 3*—*when signed notation on order for advertising constitutes guaranty of note.* Where a stockholder in two institutions, together with another person, signs a written order for advertising for such institutions for a specified amount and such stockholder subsequently and individually signs a notation thereon that "this applies to note" of the other signer of the order taken in payment of balance due on account up to a specified date after the giving of the order, such notation constitutes an express agreement to be responsible as guarantor for the payment of the note.

2. INTEREST, § 5*—*when allowed on account stated.* Interest is allowed where an action is brought on an account stated.

3. PAYMENT, § 6*—*when giving of note does not constitute.* Payment of an obligation is not made by the giving of a note of one jointly liable for such obligation unless the note itself is paid.

4. GUARANTY, § 9*—*how contract of guaranty should be construed.* Agreements to become responsible for the amount of an advertising contract and the promissory note of another, should be construed as favorably to the creditor thereon as any other written contracts, even though such agreements be regarded as a guaranty.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Vaughn v. City of Chicago, 198 Ill. App. 100.

Owen B. Vaughn, Defendant in Error, v. City of Chicago, Plaintiff in Error.

' Gen. No. 20,601. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed February 16, 1916.

Statement of the Case.

Action in the Municipal Court of Chicago by Owen B. Vaughn, plaintiff, against the City of Chicago, defendant, for twenty-seven days' wages as carpenter in the employ of the police department of the defendant city. From a judgment in favor of the plaintiff, the defendant appeals.

Upon the trial it appeared that of the twenty-seven days' wages for which plaintiff recovered, ten days were in May, 1913, while he was absent, as he claimed, on a "double header" vacation of twenty-one days, and the remaining seventeen were embraced in a period in November, 1913, during which he was suspended from duty pending investigation of charges. It subsequently appeared from his own testimony that the charges were sustained and he was dismissed from the city's employ.

From a city ordinance in force January 15, 1912, it appeared that skilled laborers who had been in the service at least a year were entitled to a vacation of eleven working days, and specifically provided that "All persons eligible for leave of absence with full pay, as hereinbefore provided, shall be entitled to such leave of absence during any fiscal year, and in no case shall these periods be cumulative." Plaintiff claimed that he was entitled to and had been allowed a "double vacation" in May on account of his failure to take a vacation during the previous year. Plaintiff was allowed and received full compensation for eleven

days' vacation in May, but at the trial no authority was shown in any officer to grant him the "double header" vacation claimed.

No statement or recitation of the judgment entered was incorporated in the stenographic report of the trial.

WILLIAM H. SEXTON and JOHN W. BECKWITH, for plaintiff in error; JOSEPH F. GROSSMAN and JOHN E. FOSTER, of counsel.

A. D. GASH, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 26*—*when stenographic report sufficient.* It is not necessary, under section 81 of the Practice Act (J. & A. ¶ 8618), to recite or preserve the judgment entered in the stenographic report of the trial, and the absence of such recital will not be ground for the dismissal of the appeal.

2. MUNICIPAL CORPORATIONS, § 145*—*when employee not entitled to cumulative vacation.* Under a city ordinance providing that skilled laborers in the service of the city at least a year are entitled to a vacation of eleven working days during any fiscal year and that these periods shall not be cumulative, an employee who does not take his vacation during the previous year is not entitled to a "double" vacation, as such a vacation is expressly forbidden by the ordinance.

3. MUNICIPAL CORPORATIONS, § 149*—*when employee not entitled to compensation.* Where a city civil service employee was suspended from duty pending investigation of charge and was dismissed from the city's employ, he cannot recover wages for the period during which he was under suspension.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thielman v. Straus, 198 Ill. App. 102.

Robert Thielman, Defendant in Error, v. Benjamin F. Straus, trading as B. F. Straus & Company, Plaintiff in Error.

Gen. No. 20,651. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Action in the Municipal Court of Chicago by Robert Thielman, plaintiff, against Benjamin F. Straus, trading as B. F. Straus & Company, defendant, on his check for \$500, which was indorsed to plaintiff by the payee. Upon a judgment in favor of plaintiff, defendant sued out a writ of error.

Defendant drew a check for \$500 in favor of the Hanna-Breckenridge Company, which indorsed it to plaintiff. Defendant in his affidavit of merits alleged that the payee of the check fraudulently represented to defendant that it was the owner of promissory notes of solvent makers to the value of \$2,000 which would be paid at maturity; but that such makers were, to the payee's knowledge, insolvent; that payee knew this statement was false and made it for the purpose of obtaining the check; that plaintiff never paid any value for the check and was not an innocent holder; that the check was delivered to him for the purpose of making it appear that he was the owner and holder thereof for value.

Upon the trial the deposition of the plaintiff stated that he received the check from the payee to apply on an account of about \$4,000, which the payee owed him; that no part of that amount ever had been paid; that he deposited such check in the bank, was credited with it and afterwards it was protested and returned.

Defendant testifying on his own behalf was not permitted to relate conversation which he had held with the president of the payee company at the time he delivered the check to him, although his counsel offered to prove that on the day the check was dated the president of the payee company stated to defendant that he would not use the check under any circumstances; that plaintiff was not indebted to the payee at that time, and "that upon said representations that he would not use the check, meaning they would not put it in the bank for collection," defendant gave him the check; that the payee company had offered for sale to defendant on said dates, notes to the amount of \$2,500; that said notes were of no value; that the payee owed Straus over \$5,000, and that the president of the payee had the note in his possession as late as the 20th of November. Aside from the proof made in regard to the distances of different towns from Chicago, this was all the evidence offered or received.

WILLIAM A. BOWLES and JAMES E. BOWLES, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error; EDWARD L. ENGLAND, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 61***—*when offered proof insufficient to establish fraud by payee.* Where defendant had drawn a check to payee which payee indorsed to plaintiff and defendant, in an action in the Municipal Court of Chicago, upon such check filed an affidavit of merits to the effect that payee obtained the check by fraudulently representing that he was the owner of certain promissory notes of a certain value, with solvent makers, and which would be paid at maturity, and that plaintiff was not an innocent holder of the check

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Muller et al. v. Bernstein et al., 198 Ill. App. 104.

for value, *held* that no defense could have been made by offered proof that on the day the check was dated payee stated to defendant that he would not put it in the bank for collection; that payee company offered to sell valueless notes to defendant; that payee owed defendant a certain sum; that payee had the check in his possession for thirteen days, there having been no other evidence in regard to the matter nor any offer of other evidence.

2. APPEAL AND ERROR, § 1772*—*when judgment not reversed for exclusion of evidence.* Where the evidence establishes a cause of action and defendant makes an offer of proof which is excluded, the judgment will not be reversed unless the specific facts offered to be proved are sufficient to establish a defense.

3. EVIDENCE, § 461*—*when evidence sufficient to establish a defense.* To make out a defense it is sufficient if the proof offered, when viewed in its most favorable light and considered in connection with other evidence received or expressly offered by defendant, could constitute a defense.

Peter Muller and Jacob Muller, Appellants, v. Abraham Bernstein and Henry Wolff, Appellees.

Gen. No. 20,936. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and judgment here. Opinion filed February 16, 1916. Rehearing granted and additional opinion filed April 12, 1916.

Statement of the Case.

Action in Municipal Court of Chicago by Peter Muller and Jacob Muller, plaintiffs, against Abraham Bernstein and Henry Wolff, defendants, to recover damages for defendant's failure to terminate certain leases. From a judgment for defendants, the plaintiffs bring writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In the lease sued on, dated April 25, 1910, the defendants demised to plaintiffs two stores from May 7, 1910, to April 30, 1920. The tenth clause of the lease provided that "It is further covenanted and agreed by the parties of the first part that the parties of the second part shall have said demised premises free of any rent to July 1, 1910, but said parties of the second part agree to assume all responsibility of eviction, if necessary, the present lessees of said demised premises, but parties of the first part agree to serve as witnesses should their testimony be required."

Upon the first trial of this cause, the Municipal Court struck the plaintiffs' statement of claim from the files on the ground that it did not state a cause of action, and on appeal to the Appellate Court (*Muller v. Bernstein*, 183 Ill. App. 154) it was held that the tenth section of the lease placed the duty of terminating the prior leases by May 7th upon the defendants and lessors. Mr. Justice Brown, speaking for the court in that case, said, at page 157: "The clause in question as we construe it did nothing more than make an express statement of the situation which the law made without it." Upon the second trial, from which this appeal was made, the Municipal Court admitted testimony offered for the purpose of showing that the intention of the parties was to place the burden of terminating the lease on the plaintiffs and lessees, and on the evidence so offered the court held that the plaintiffs were charged with that duty, and so entered judgment for the defendants.

EDWARD A. MECHLING, for appellants; WYMAN, JURGENS & CARPENTER, of counsel.

BLUM & BLUM, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Muller et al. v. Bernstein et al., 198 Ill. App. 104.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 84*—*when evidence inadmissible to vary terms of lease.* Where a lease gives the lessees right to possession on a certain day and provides that lessees assume responsibility for eviction, if necessary, of prior tenants in possession at date of lease, as such lease is not ambiguous in its terms, it cannot be varied by extrinsic evidence.

2. LANDLORD AND TENANT, § 191*—*what damages recoverable for breach of covenant of quiet enjoyment.* Where plaintiffs were excluded from premises demised to them by reason of defendants' failure, as lessors, to perform their implied covenant of quiet enjoyment, they only recover value of the use of the premises equal to the amount of monthly rental up to the time when they could have obtained possession of the premises by the service of notices.

3. APPEAL AND ERROR, § 1414*—*when finding of court conclusive on appeal.* Where evidence is undisputed that the value of the use of the premises is equal to the monthly rental in the lease and no exception is preserved to a finding of the court on that valuation, it must be held that such evidence is conclusive.

On Rehearing.

1. LANDLORD AND TENANT, § 176*—*when covenant for quiet enjoyment implied.* A lease of premises on which there was another outstanding lease that could be terminated by suitable action on the part of lessors, and which contains a clause whereby the lessees "assume all responsibility of eviction if necessary," of the tenants under the prior outstanding lease, in itself, and notwithstanding such clause, implies a covenant of quiet enjoyment.

2. LANDLORD AND TENANT, § 261*—*what constitutes responsibility of eviction.* The words "responsibility of eviction" in a lease mean the burden of expelling by legal process those in possession, if they wrongfully withhold it.

3. LANDLORD AND TENANT, § 79*—*when lease construed as imposing obligation on lessor to terminate outstanding lease.* Words in a lease to the effect that lessors "agree to serve as witnesses should their testimony be required," which follow a phrase whereby lessees agree "to assume all responsibility of eviction, if necessary," of tenants in possession, show intention that lessors are to take steps to terminate the lease by giving necessary notices.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. LANDLORD AND TENANT, § 73*—*when lease construed as authorizing free rent for time lessee deprived of premises because of remodeling.* Where a lease for a long term contains a clause giving the premises without rent to lessees for fifty-four days and lessees agree therein to remodel and subdivide the building leased, such clause must not be construed as evidencing the intention that the free rental was given in consideration of lessees assuming the burden of serving notices on tenants in possession and to cover the time it would take to evict them, but rather as showing that the concession in rent was for the time lessees would be deprived of any productive use of the premises on account of the remodeling and subdivision thereof.

5. LANDLORD AND TENANT, § 261*—*when lessees obliged to evict tenant in possession.* A lease which provides that the lessees "agree to assume all responsibility of eviction, if necessary," of tenants in possession, and also provides that the lessees "shall have the demised premises free of any rent" to a specified date, must be construed as placing the burden of evicting the prior tenants upon the lessees, but not that of terminating the lease.

6. EVIDENCE, § 319*—*when written instrument may not be varied by parol evidence.* The rule which prevents the varying of a written instrument by parol evidence denies such an effect to parol evidence even when such evidence is properly in the record.

7. EVIDENCE, § 91*—*what does not constitute waiver of objection to parol evidence.* Evidence in regard to discussions with lessors on the matter of service of notice to tenants, where the service of notice is in issue, do not constitute a waiver of objection to parol evidence, offered by lessors to explain terms of a lease which are not ambiguous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Schmutz, 198 Ill. App. 108.

The People of the State of Illinois, Defendant in Error, v. Emil Schmutz, Plaintiff in Error.

Gen. No. 21, 617. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed February 16, 1916. Rehearing denied March 1, 1916.

Statement of the Case.

Action by the People of the State of Illinois against Emil Schmutz, defendant, based on an information charging that he wrongfully and unlawfully abandoned his wife, Matilda Schmutz. To reverse judgment for the People, defendant prosecutes this writ of error.

At the hearing it appeared that defendant had previously been married to one Iva May Meyers, who was granted a divorce from him June 5, 1905, in the Superior Court of Cook county, and that he married the complaining witness in this case April 21, 1906, at Crown Point, Indiana.

PRINGLE & FEARING, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 172*—*when divorced person may not remarry.* Under the Act of May 13, 1905 (J. & A. ¶ 4216), concerning the marriage of divorced persons, a man who marries another woman in another State within less than one year after his divorce from his first wife does not contract a valid marriage in such State.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Larsen v. Ward Corby Co., 198 Ill. App. 109.

2. HUSBAND AND WIFE, § 273*—*when husband not guilty of wife desertion.* Where a man remarries in another State within less than one year of the date of the divorce from his former wife, and deserts his second wife, he cannot be convicted of wife desertion, as such second marriage is illegal.

Peter Larsen, Appellee, v. Ward Corby Company, Appellant.

Gen. No. 20,985. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed February 16, 1916. Rehearing denied March 1, 1916.

Statement of the Case.

Action on the case by Peter Larsen, plaintiff, against Ward Corby Company, defendant, for personal injuries. From a judgment for plaintiff in the sum of \$2,000, defendant appeals.

April 19, 1910, at about 11 o'clock in the forenoon, plaintiff was riding east in Washington boulevard, Chicago, on his bicycle. Washington boulevard runs east and west and is intersected at right angles by California avenue. As plaintiff reached the intersection of California avenue, a funeral procession, consisting of about thirty carriages was moving north in the center of said avenue. Plaintiff dismounted from his wheel, waiting for the procession to pass, and stood near the southwest corner of the intersection of said boulevard and avenue. At the time the funeral procession was passing, a two-horse team belonging to the defendant, with driver and empty wagon was going

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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west in Lake street, which runs parallel with and is two blocks north of Washington boulevard. When the team reached California avenue, the funeral procession was passing north across Lake street in said avenue. The driver, to avoid delay and not being able to pass through the funeral procession, turned south in California avenue and drove along the east side of said avenue, the funeral procession proceeding north about the center of the same. The evidence tends to show that as the team approached the north side of Washington boulevard, the last carriage in the funeral procession was nearing the south side of said boulevard. As the last carriage approached Washington boulevard, plaintiff mounted his wheel intending to cross the avenue and proceed east on Washington boulevard. He turned towards the south to go around the rear of the last carriage, and then turned east or northeast. As he came around the rear of the last carriage, defendant's team, which was "going south on a fast trot" as one witness put it, turned to the southwest so as to get on the west side of the street, and collided with the plaintiff. Neither the driver of the team nor the plaintiff knew of the approach of the other until they were but a few feet apart. Both the driver and the plaintiff tried to avoid the collision, but were unable to do so. The pole of the wagon struck the plaintiff in the jaw and he was thrown to the pavement; sustaining an oblique fracture of the left lower jaw bone, a fracture of the right clavicle, and he was otherwise bruised and injured. The driver stopped the team and assisted the plaintiff to a doctor's office in the vicinity. Plaintiff was in the hospital for about two weeks. After the injury he was unable to work for about thirteen weeks. When he returned to work he was unable to properly do his work on account of the injuries. Prior to the accident plaintiff was employed as a night watchman, doing janitor work and sweeping up the floors around a factory. He earned \$12 per

week. The case was tried before the court and jury, and a judgment for \$2,000 was entered in favor of the plaintiff. An appeal was taken to this court where the judgment was reversed and the cause remanded for errors of law. (See 184 Ill. App. 38.) On a second trial a verdict was returned and a judgment entered for the same amount in favor of the plaintiff, to reverse which this appeal is prosecuted.

The court gave the following instruction for the plaintiff:

“The court instructs the jury that the words “ordinary care,” wherever used in these instructions, mean, according to the law of the State of Illinois, that degree of care which a reasonably prudent or cautious person before and at the time in question would take to avoid injury under like circumstances.

“And the court further instructs the jury that the word “negligence,” wherever used in these instructions, means, according to the law of the State of Illinois, either an omission to do something which a reasonable person guided by those ordinary considerations which ordinarily regulate human affairs would do, or “negligence” is the doing of something which a prudent and reasonable person would not do under similar or like circumstances.

“And the court further instructs the jury that if they believe from the evidence that the plaintiff was injured and sustained damage as alleged in plaintiff’s declaration or in some count thereof, while he was in the exercise of ordinary care, and if they further believe that his injury, if any, was caused by the negligence of defendant, as charged in the declaration or in some count thereof, then, under the law, it becomes the duty of the jury to find a verdict in favor of the plaintiff.”

The court refused the following requested instruction for the defendant:

“The jury are instructed that the issues in this case should be determined by them as in any ordinary suit where an ordinary plaintiff sues an ordinary defendant

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to recover money giving the verdict to the plaintiff only if the evidence preponderates in favor of the plaintiff's contention, and unless it do so preponderate you should as readily give the verdict for the defendant, and in determining where the preponderance lies while it does not consist solely in the greater number of witnesses yet the jury are instructed that the greater number of credible witnesses on the one side or the other of any disputed point is proper matter to be considered in determining the question of preponderance; and you may also consider the position of the witnesses at the time of the accident; that point of view from which they witnessed it and everything which appeals to your judgment as affecting the value and reliability of their testimony."

LOUIS J. BEHAN, for appellant.

FRANK D. BURGESS and EDWARD MAHER, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 198*—*when contributory negligence question for jury.* The rule is that when the inference of contributory negligence necessarily results from the evidence it becomes a question of law for the court, but where the evidence is conflicting it is a question of fact to be determined by the jury.

2. NEGLIGENCE, § 191*—*when negligence of driver of team question for jury.* Where there was evidence that defendant's team was driven on the wrong side of the street at a fast trot and was not under proper control, at and prior to the time of the injury caused by such team, such evidence tended to prove negligence and the case was properly submitted to the jury.

3. EVIDENCE, § 444*—*when opinion evidence of physician as to nature of injuries admissible.* Where a doctor, testifying in a personal injury suit for the plaintiff made a digital examination of the plaintiff on the day of the trial, first saw plaintiff on such day, and found injuries on plaintiff's jaw bone and clavicle, such examination

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was objective and not subjective and the doctor's opinion thereon was admissible.

4. WITNESSES, § 224*—*when defendant may not be cross-examined as to number of dependent children.* Trial court may properly refuse to permit defendant in action on account of personal injuries to cross-examine plaintiff with regard to the ages of children for the purpose of showing that there were no children dependent on plaintiff for support.

5. NEGLIGENCE, § 228*—*when instruction not objectionable as limiting exercise of ordinary care to exact time of collision.* An instruction in an action for personal injuries is not objectionable as limiting the exercise of ordinary care on the part of the plaintiff to the exact time that the collision occurred, because it tells the jury that if they believe from the evidence that the plaintiff was injured and sustained damages as alleged in the declaration or some count thereof, "while in the exercise of ordinary care," where in a prior paragraph of the same instruction "ordinary care" is defined as that degree of care which a reasonably prudent or cautious person before and at the time in question would take to avoid the injury under like circumstances.

6. NEGLIGENCE, § 228*—*when instruction not objectionable as limiting exercise of ordinary care to time of accident.* An objection to an instruction which reads "while in the use of ordinary care," on the ground that it limits the use of ordinary care to the exact time of the injury, is untenable.

7. INSTRUCTIONS, § 250*—*when giving of instruction not reversible error.* Although it is improper to give an instruction which is not applicable to the facts of the case, yet the giving of such instruction will not constitute reversible error, where the reviewing court can see from an examination of the entire record that it did not mislead the jury.

8. INSTRUCTIONS, § 88*—*when instruction on preponderance of evidence misleading.* An instruction enumerating certain things proper to be considered by the jury in determining the matter of the preponderance of the evidence, but which does not leave the jury free to consider all the evidence introduced and all the facts and circumstances in evidence, in determining where the preponderance or greater weight of the evidence lies, is misleading and is properly refused.

9. DAMAGES, § 110*—*when verdict for personal injuries not excessive.* A verdict for \$2,000 for personal injuries is not excessive where plaintiff sustained a fracture of the left lower jaw, a fracture of the collar bone, several bruises on different parts of the body, was about ten days in the hospital and under treatment for two or three months and neither clavicle nor collar bone had united

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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four years after the accident, his face was disfigured, and there was evidence that the condition of jawbone and clavicle was permanent.

10. APPEAL AND ERROR, § 1413*—*when verdict not disturbed.* A verdict for damages will be sustained on appeal where two juries have rendered verdicts for the same sum, and the verdicts have been approved by the trial judges.

**Owen B. Vaughn, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 21,089. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN P. McGOERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Mandamus by Owen B. Vaughn, petitioner, against the City of Chicago, respondent, to reinstate him in position as carpenter, from which position the Civil Service Commission of respondent city had removed him. From a judgment in favor of respondent entered upon a demurrer to the petition, petitioner brings error.

The petition averred that the office or position to which he sought reinstatement was created by ordinance; that such position was that of carpenter for which he had taken a civil service examination and which he duly passed; that he qualified for the position; that charges against him were not heard by the Civil Service Commission but by a police trial board composed of three persons, two of whom were members of the Civil Service Commission.

The petition also averred that a judgment of the Municipal Court of Chicago for wages due him in such

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position was *res adjudicata* of facts which were set up in the action in the Municipal Court and also in this position, and that respondent was estopped from denying them.

A. D. GASH and A. G. DICUS, for plaintiff in error.

RICHARD S. FOLSOM, for defendant in error; JOHN E. FOSTER, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. MANDAMUS, § 139*—*what person seeking reinstatement in office or position must allege in petition.* A person seeking reinstatement in office or position by a writ of mandamus must show in his petition the legal existence of the office or position, his clear right to the office or position and the duty on the part of respondents to perform the act sought to be enforced.

2. MANDAMUS, § 150*—*what allegations in petition are admitted on demurrer.* While in a petition for mandamus all allegations in the petition that are well pleaded are admitted by the demurrer, mere conclusions of the pleader are not so admitted.

3. MANDAMUS, § 139*—*when petition for reinstatement in position demurrable.* Where petitioner in mandamus for reinstatement to position of carpenter in the police department of Chicago relied on city ordinances and the petitioner did not set up the provisions of the ordinances nor the substance thereof, but simply his conclusions that the office or position was established by the ordinances, whether such ordinances created the office or position was a question of law, and the petition was clearly demurrable.

4. CIVIL SERVICE, § 23*—*when findings of police trial board are conclusive.* Where a police trial board hearing charges against an employee of the police department is composed of two members of the Civil Service Commission, such board need not report its decision to the Civil Service Commission, as the findings of the trial board are, under such circumstances, conclusive.

5. JUDGMENT, § 508*—*when not res adjudicata as to legal existence of office and right thereto.* Where a petitioner for mandamus to reinstate himself in the position of carpenter in the Chicago police department averred that, in an action in the Chicago Munici-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pal Court for salary due him, he set up facts showing the legal existence of the office he was seeking and that a judgment in such court was *res adjudicata* of the legal existence of the office and his right thereto, *held* that such judgment was not *res adjudicata*, as it may have been rendered upon the ground that the petitioner had performed the services for which he was seeking pay, and especially as such judgment had been reversed by the Appellate Court.

In the Matter of the Estate of Daniel J. Davis, Deceased.

E. G. Tisdale and O. D. Tisdale, Appellants, v. Maud R. Davis, Administratrix of the Estate of Daniel J. Davis, Deceased, Appellee.

Gen. No. 21,180.

1. COURTS, § 105*—*when Probate Court equitable jurisdiction to reinstate and allow claim.* Probate Court has equitable jurisdiction to enter order on oral motion reinstating and allowing a claim which was dismissed, and a formal bill in equity is not necessary for such purpose.

2. EXECUTORS AND ADMINISTRATORS, § 248*—*what constitutes sufficient exhibition of claim to prevent bar of statute of limitations.* Where claim in Probate Court is dismissed for want of prosecution, and after more than two years from the issuance of letters of administration, and a duplicate of such claim, the original having been lost, is filed by permission of the court, and although the administratrix was not served by summons but was otherwise notified and appeared in court, there was a sufficient exhibition of the claim to the court under Rev. St., ch. 3, sec. 70 (J. & A. ¶ 119), and it was not barred by the two years' limitation prescribed in such statute.

3. APPEAL AND ERROR, § 1725*—*when previous decision law of case.* Previous holding of Appellate Court in same subject-matter is law of the case on subsequent appeal.

4. APPEAL AND ERROR, § 1802*—*when case reversed without re-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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manding. Judgment will be entered in Appellate Court on reversed case where all facts are before the court, a jury waived, and no reason exists for remanding the cause.

Appeal from the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and judgment here. Opinion filed February 16, 1916. *Certiorari* denied by Supreme Court (making opinion final).

BOYLE & MOTT, for appellants.

ALDEN, LATHAM & YOUNG, for appellee; CHARLES MARTIN, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a judgment entered in the Circuit Court of Cook county, November 23, 1914, dismissing a claim of appellants against appellee, after a hearing on the merits. The facts are these: February 24, 1897, a judgment was entered in the Circuit Court of Cook county in the following form:

"148704

E. D. Tisdale and O. D. Tisdale)

vs.)

Davis and Rankin Building and Manufactur-) Case.
ing Company and Daniel J. Davis and Wil-)
liam J. Davis.)

"Finding and assessment of damages on default heretofore entered against Daniel J. Davis and Davis and Rankin Building and Manufacturing Co. in sum of \$10,750. Motion of defendant company for new trial overruled. Judgment on finding for \$10,750 against Daniel J. Davis and Davis and Rankin Building and Mfg. Co. and order for *sci fa* vs. *W. J. Davis*. Lv. to defendant Davis & R. B. & M. Co. to file bill of exceptions in 60 days."

Tisdale et al. v. Davis, 198 Ill. App. 116.

Daniel J. Davis having subsequently died, his death was suggested of record, and it was ordered that the cause proceed against the appellee, and thereupon, November, 1911, appellants moved the court to direct the clerk of the court to correct the record made on February 24, 1897, and to enter in full and proper form, as of February 24, 1897, the judgment above mentioned. Appellee made a counter motion that the clerk be directed to correct the said judgment by striking out the name of Daniel J. Davis wherever it appeared and vacating the default theretofore entered against him. Both of these motions were denied. Appellants appealed to this court, and the administratrix assigned cross-errors. This court affirmed the orders of the Circuit Court (*Tisdale v. Davis and Rankin Bldg. & Mfg. Co.*, 182 Ill. App. 31). It appears that the judgment above mentioned was prepared by plaintiff's attorney and signed by the court. The clerk entered the judgment of record in the usual expanded form, but this was afterwards stricken out.

Daniel J. Davis died intestate January 19, 1911. Letters of administration were issued to appellee January 25, 1911, and on October 6, 1911, appellants filed their claim against his estate based on the judgment above mentioned. On June 24, 1912, the claim was dismissed for want of prosecution. The parties having been notified, appellants on December 9, 1913, moved the court to reinstate the claim. The matter was continued from time to time. February 3, 1914, the Probate Court found that the claim had been lost or mislaid, and leave was given to file a duplicate which was done instantler. May 20, 1914, the matter came on for hearing, affidavits were submitted, and the court, after arguments of counsel, found that the claim had been "dismissed by this court through mistake;" that no hearing upon the merits was had; that the claim was meritorious and should be heard; that it had been lost from the files, and a duplicate filed. The

order of dismissal was set aside and vacated, and the claim reinstated, heard upon its merits, and allowed for \$20,005 as of the seventh class to be paid in due course of administration. Appellee appealed to the Circuit Court, where a jury was waived and the matter submitted to the court. Appellants submitted two propositions of law which they asked the court to hold: (1) That the Probate Court had jurisdiction of the subject-matter and of the parties when it allowed the claim; and (2) that the judgment entered February 24, 1897, in the Circuit Court was valid. The court held the first proposition but denied the second and disallowed the claim. This appeal followed. Appellee has assigned cross-errors.

The two questions before this court are: (1) Did the Probate Court have jurisdiction of the parties and of the subject-matter on May 20, 1914, when the claim was allowed; and (2) is the judgment entered February 24, 1897, a valid judgment?

We will dispose of these in the order named.

First. County and Probate Courts are courts of general and unlimited jurisdiction in matters of administration, and exercise an equitable jurisdiction adapted to their organization and modes of procedure, and in the exercise of such equitable jurisdiction may, on motion at a subsequent term, set aside an order allowing or disallowing a claim against an estate, where fraud or mistake has intervened. *Schlink v. Maxton*, 153 Ill. 447; *Sherman v. Whiteside*, 190 Ill. 576; *Heppe v. Szczepanski*, 209 Ill. 88; *Whittemore v. Coleman*, 239 Ill. 430; *Marshall v. Coleman*, 187 Ill. 569; *Domitski v. American Linseed Co.*, 221 Ill. 161; *Ford v. First Nat. Bank*, 201 Ill. 120. Appellee concedes that this is the law, but her position is as stated by her counsel: "It is not claimed that there was any fraud or mistake in the entry of the order of dismissal, such as a court of equity could relieve against, but a mere oral motion was made to vacate, without any showing as to

Tisdale et al. v. Davis, 198 Ill. App. 116.

diligence or excuse for not appearing on the call of the docket. True, the draft order in the Probate Court states that the claim was dismissed by mistake, but no proof was made, and on the trial *de novo* in the Circuit Court no claim was even made that there was a mistake. Besides, proceedings similar to a bill in equity must be taken to set aside a judgment for mistake or fraud." The record shows that on the motion to reinstate the claim in the Probate Court, affidavits were filed and read. What these contained does not appear. The court, however, found that the claim was dismissed through mistake. In *Schlink v. Maxton, supra*, after the term had passed at which a claim was allowed against an estate, a motion was made to vacate and set aside the order of allowance. The motion was based upon affidavits. The court set aside the order. It was there also urged, as it is here, that after the term had passed at which an order was entered, allowing a claim, before the same could be vacated, a proceeding in the nature of a bill in equity must be had. The court there said (p. 453): "It is urged that even if the county court, sitting as a court of probate, is invested with equitable jurisdiction, yet it has no power, at a subsequent term, to set aside its own order, judgment or decree except upon a formal bill filed for that specific purpose. We do not so understand the practice in the probate courts." Under the foregoing authorities, we are clearly of the opinion that the Probate Court had jurisdiction to enter the order allowing the claim.

In the case of *Phoenix Ins. Co. v. Guderyahn*, 20 Ill. App. 161, a claim was filed against an estate in the Probate Court of Cook county. After the expiration of more than two years from the issuance of letters, the claim was dismissed for want of prosecution. The claimant learned of the dismissal after the expiration of the term, refiled it and had a summons issued against

the executor. On hearing, the claim was disallowed, and appeal taken to the Circuit Court, where the claim was allowed, to be paid out of property not inventoried by the executor, as a claim not exhibited within two years from the date of the issuance of the letters. The claimant appealed to this court, Mr. Justice Moran, in delivering the opinion of the court, said that the only question presented was: "Was the claim barred by the two years' limitation prescribed in Sec. 70, Chap. 3, R. S.," and continuing said: "It has been expressly decided by the Supreme Court that filing a claim against an estate, in the Probate Court, with the clerk thereof, within two years after the grant of letters of administration, is an exhibition of the claim to the court, so as to take the claim out of the limitation of two years in Sec. 70, * * * and that if the claim has been so filed the claimant may, after the expiration of two years, summon the administrator, and if the claim is allowed, have it paid in due course of administration. *Wallace v. Gatchell*, 106 Ill. 315.

"The presentation of the claim to the court and the filing thereof was, then, a sufficient exhibition of the claim to the court to take it out of the two years' statute. We presume it would not be contended, that if the claim had been called and dismissed at any time within the two years from the issuing of letters, it might not be filed again before the expiration of the two years, and adjudicated and ordered paid in due course. A dismissal of a claim on call because the claimant does not appear, determines nothing as to the justice of the claim, and can not be a bar to an adjudication of the claim when newly presented, and the effect of the dismissal is precisely the same whether it occurs before or after the expiration of the two years."

The only difference between that case and the case at bar is that there the claim was "newly presented" and a summons issued, while here a duplicate of the

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claim was filed but no summons issued. Appellee, however, was notified and appeared in court and contested the claim. We think the principle in the two cases is the same.

Second. Appellants contend that the validity of the judgment upon which the claim is based has been determined by this court in the case of *Tisdale v. Davis and Rankin Bldg. & Mfg. Co.*, *supra*. On the other hand, appellee's position is that the so-called judgment is in fact not a judgment, and that the opinion of this court wherein this question is mentioned is mere *dictum*. Mr. Justice McSurely, in delivering the opinion of the court, there said: "The gist of appellants' claim is that they are entitled to have the expanded form of the judgment entered of record. We are not referred to any authority for the proposition that litigants are entitled to any particular form of a judgment order other than that which sufficiently expresses the judgment of the court. If the judgment order herein is sufficient, there would be no reason for the trial court to grant the motion of appellants, and in the absence of anything to the contrary, we must assume that to be the reason for the refusal of the court to allow the motion. The appellants do not point out in what respect the judgment is insufficient, but in argument assume this is so, in which assumption appellee of course willingly joins. The sufficiency of the judgment is not questioned by any assignment of error. Inspection of the judgment order above set forth does not disclose to this court the omission of any element essential to its validity. * * * No convincing reason appearing for changing the form of the judgment as prayed for, the refusal of the trial court to allow the motion was proper."

The language above quoted is clear and unambiguous. It holds the judgment valid and, under the decisions of this court, establishes the law of the case.

Bolger v. City of Chicago, 198 Ill. App. 123.

(*Union Nat. Bank of Chicago v. Post*, 93 Ill. App. 339;
Wilson v. Carlinville Nat. Bank, 87 Ill. App. 364.)

This case must, therefore, be reversed, but as all the facts are before this court, and as a jury was waived, no reason exists for remanding the cause. A judgment will, therefore, be entered in this court for the amount due, which is \$20,005, to which should be added five per cent. interest from May 20, 1914, the date on which the claim was allowed in the Probate Court, to the date on which this judgment is entered.

Judgment reversed and judgment in this court.

**William Bolger, a minor, Appellee, v. City of Chicago,
Appellant.**

Gen. No. 20,854.

1. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to establish prima facie case of negligence in maintenance of sewer conduit.* In an action by a pedestrian against a city for damages for personal injuries sustained as a result of an explosion of sewer gas in a sewer conduit which also contained an electric system, as he stepped on the cover of a manhole while crossing the street, evidence *held* sufficient to establish a prima facie case of negligence.

2. APPEAL AND ERROR, § 1466*—*when admission of evidence harmless error.* In an action by a pedestrian against a city for damages for personal injuries sustained as a result of an explosion of sewer gas in a sewer conduit, which also contained electric wires, when plaintiff stepped on the cover of the manhole, *held* that the admission of evidence, in behalf of plaintiff, as to facts and circumstances which might or could have given rise to the accident was not prejudicial where it was merely cumulative, and the defendant had not offered any evidence tending to explain the accident or the circumstances in which it occurred.

3. APPEAL AND ERROR, § 717*—*when contention on matter not in record will not be considered.* In the absence of evidence in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Vaughn v. City of Chicago, 198 Ill. App. 114.

four years after the accident, his face was disfigured, and there was evidence that the condition of jawbone and clavicle was permanent.

10. APPEAL AND ERROR, § 1413*—*when verdict not disturbed.* A verdict for damages will be sustained on appeal where two juries have rendered verdicts for the same sum, and the verdicts have been approved by the trial judges.

**Owen B. Vaughn, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 21,089. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN P. McGOEBY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 16, 1916.

Statement of the Case.

Mandamus by Owen B. Vaughn, petitioner, against the City of Chicago, respondent, to reinstate him in position as carpenter, from which position the Civil Service Commission of respondent city had removed him. From a judgment in favor of respondent entered upon a demurrer to the petition, petitioner brings error.

The petition averred that the office or position to which he sought reinstatement was created by ordinance; that such position was that of carpenter for which he had taken a civil service examination and which he duly passed; that he qualified for the position; that charges against him were not heard by the Civil Service Commission but by a police trial board composed of three persons, two of whom were members of the Civil Service Commission.

The petition also averred that a judgment of the Municipal Court of Chicago for wages due him in such

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position was *res adjudicata* of facts which were set up in the action in the Municipal Court and also in this position, and that respondent was estopped from denying them.

A. D. GASH and A. G. DICUS, for plaintiff in error.

RICHARD S. FOLSOM, for defendant in error; JOHN E. FOSTER, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. MANDAMUS, § 139*—*what person seeking reinstatement in office or position must allege in petition.* A person seeking reinstatement in office or position by a writ of mandamus must show in his petition the legal existence of the office or position, his clear right to the office or position and the duty on the part of respondents to perform the act sought to be enforced.

2. MANDAMUS, § 150*—*what allegations in petition are admitted on demurrer.* While in a petition for mandamus all allegations in the petition that are well pleaded are admitted by the demurrer, mere conclusions of the pleader are not so admitted.

3. MANDAMUS, § 139*—*when petition for reinstatement in position demurrable.* Where petitioner in mandamus for reinstatement to position of carpenter in the police department of Chicago relied on city ordinances and the petitioner did not set up the provisions of the ordinances nor the substance thereof, but simply his conclusions that the office or position was established by the ordinances, whether such ordinances created the office or position was a question of law, and the petition was clearly demurrable.

4. CIVIL SERVICE, § 23*—*when findings of police trial board are conclusive.* Where a police trial board hearing charges against an employee of the police department is composed of two members of the Civil Service Commission, such board need not report its decision to the Civil Service Commission, as the findings of the trial board are, under such circumstances, conclusive.

5. JUDGMENT, § 508*—*when not res adjudicata as to legal existence of office and right thereto.* Where a petitioner for mandamus to reinstate himself in the position of carpenter in the Chicago police department averred that, in an action in the Chicago Munici-

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this statement of the rule is very general in its terms, and not applicable, perhaps, to every case coming within the letter of the language used. It therefore becomes our duty to consider whether it applies in the case at bar. A somewhat similar question arose in *Illinois Cent. R. Co. v. Phillips*, 49 Ill. 234. There the plaintiff had been injured through the explosion of a boiler, and it was urged that the court erred in giving the following instruction, which appears on page 239:

“The mere fact that the boiler of the engine in question exploded, causing injury to the plaintiff, is not, in this case, and under the relations existing at that time, between the plaintiff and the defendants, as set forth in the declaration, even prima facie evidence of negligence, or want of due and proper care on the part of the defendants, either in respect to the condition or management of said engine; and the jury are not authorized to find the existence of such negligence, or want of due and proper care, from the mere fact of such explosion and injury.”

The court held that it was improper to say that the explosion was not prima facie evidence of negligence which cast the burden of explanation upon the defendant. The question again came before the court in *Illinois Cent. R. Co. v. Phillips*, 55 Ill. 194, and the court adhered to its former opinion, saying at page 199: “This court held in this case, in 49 Ill. *supra*, that the mere fact that the boiler exploded was prima facie evidence of negligence; and that the burden of disproving the negligence was thrown upon the company.”

The question, then, is, as to whether there is anything in reason which distinguishes, in principle, the case at bar from the cases cited, and whether there is any rule of public policy which forbids the application of the general doctrine stated above to the case of explosions occurring underneath the street. We know, as a matter of law, that the entire and complete control

of the surface of the street and everything underneath it is vested in the City of Chicago. On the face of this record it is admitted that the manhole, the manhole cover, the conduit and the electric wires placed therein and the sewer mains were the property and under the management and control of the defendant. It further appears that explosive gases usually do collect in such conduits and had collected in the conduit in question at and for some time prior to the time of the accident, and that their ignition was its cause. Knowledge concerning the wires, conduits, sewers, gas mains, etc., beneath the surface of the street is, as between the city and any inhabitant, peculiarly within the knowledge of the former. As streets are, of necessity, constantly used by all of its inhabitants, and as the safety of the public is a matter which the law considers of paramount importance, the duty of the city to use ordinary care to see that the safety of the public is not endangered as the result of its arrangement and management of the instrumentalities beneath the street is, of course, indisputable. When, therefore, an accident happens through an explosion in one of the chambers beneath the surface of the street,—an accident which, admittedly, ordinarily would not happen if those who had charge exercised proper care—may the city, when this proof is made, say: “It is for you, who can have no definite knowledge in regard to the real cause of this accident, to demonstrate to the jury what its precise origin was, and in what definite particular those who had charge were negligent”? It is obvious that the adoption of such a principle would put in jeopardy the lives and safety of the inhabitants of a municipality, and leave them without practical means of redress. Upon a careful consideration of the question, therefore, we are firmly of the opinion that the principle which throws upon the owners of a boiler or an engine the burden, not necessarily of explaining the origin of an explosion, but of showing facts and circumstances

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which would rebut the inference of negligence, applies with even greater force to the case of explosions in conduits beneath the public streets. It follows from this that as the evidence disclosed by this record made out a *prima facie* case against the city, and the city expressly declined to offer any explanatory proof whatever, the plaintiff was entitled to judgment.

The plaintiff also offered evidence as to circumstances which might or could have given rise to the accident, and as to how it might have been prevented; the defendant contends that the admission of this evidence was not proper. Had the city offered any evidence tending to explain the accident or the circumstances in which it occurred, this objection might have some weight, but in view of its refusal to present any evidence at all, as the evidence complained of was, at best, merely cumulative, its admission would not in any way prejudice the defendant.

We notice also that on the question of the construction of the solid, unventilated manhole cover the defendant contends that it could not be considered as evidence of negligence, as the city is not liable where it exercised a *quasi* judicial discretion in the adoption of a plan of construction. Without discussing the merits of the principle contended for, as applied to this case, it is sufficient to say that there is not a particle of evidence in the record tending to show that the presence of the solid, unventilated cover was due to the adoption of a plan of construction.

For the reasons indicated, the judgment of the Superior Court will be affirmed.

Affirmed.

Minnie V. Connor, Defendant in Error, v. Louis Greenberg, Plaintiff in Error.**Gen. No. 19,190.**

1. SHERIFFS AND CONSTABLES, § 78*—*when replication to plea of authority sufficient.* In action in trespass where defendant pleaded that he had a writ of *fleri facias*, that the outer door of plaintiff's house was open at the time he entered, to which plaintiff replied, admitting defendant had the writ but that he nevertheless committed the trespass as alleged in the declaration *held*, that it was unnecessary for plaintiff to specifically charge in the replication that defendant broke the outer doors, but that by replying as to the abuse to defendant's plea of authority she stated matter in confession and avoidance.

2. PLEADING, § 183*—*when defendant may demur specially to replication.* In action in trespass where a replication *de injuria* is insufficient, defendant may demur specially.

3. PLEADING, § 466*—*when defect in replication aided by verdict.* A defect in a replication *de injuria* in an action of trespass is aided by verdict.

4. SHERIFFS AND CONSTABLES, § 80*—*when error in admission of evidence not prejudicial.* Any error of the trial court in an action, in trespass, wherein it was alleged that a constable broke the outer doors of a residence to serve a writ, in allowing plaintiff to testify that she had no recollection of any service of a summons on her in the action wherein the writ was served, was not prejudicial, where the trial court gave instructions which were predicated upon the assumption that defendant had a valid writ of execution.

5. TRESPASS, § 11*—*what constitutes a dwelling house.* In an action in trespass, a boarding house is a dwelling house where plaintiff resides therein.

6. SHERIFFS AND CONSTABLES, § 83*—*when instruction as to right of officer breaking in door of dwelling to serve writ sufficient.* In an action in trespass against a constable serving a writ and breaking into a dwelling house, inner doors in a vestibule leading into a house are outer doors of the house even though there may be outer doors to the vestibule, and an instruction with reference to breaking in the outer door need not designate which of such above doors were inner or outer.

7. SHERIFFS AND CONSTABLES, § 83*—*when instruction as to measure of damages for injury to business because of unlawful entry by*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Connor v. Greenberg, 198 Ill. App. 129.

constable sufficient. Where in an action in trespass for unlawful entry of constable serving a writ, it appears that the officer unlawfully entered plaintiff's house, it is proper to instruct the jury that if they find for plaintiff and if they find that plaintiff had an established business which was injured or destroyed as a proximate result of the acts of defendant in taking plaintiff's goods they may assess damages proximately accruing from such loss of business.

8. SHERIFFS AND CONSTABLES, § 83*—*when instruction in action against constable for breaking into a house to serve a writ not prejudicial.* Where in action in trespass against a constable for breaking into a house to serve a writ, a portion of an instruction complained of is predicated upon the assumption that defendant made a peaceable entry into plaintiff's house, whereas the jury found in one of their special findings that he broke the outer door thereof, defendant could not have been prejudiced by such instruction.

9. SHERIFFS AND CONSTABLES, § 80*—*when evidence sufficient to sustain verdict.* In an action against a constable for damages for breaking into a house to serve a writ on plaintiff, evidence held sufficient to sustain a verdict for plaintiff.

Error to the Circuit Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 24, 1916.

Statement by the Court. This action in trespass was commenced in the Circuit Court of Cook county on April 6, 1905. For various causes a trial was not had until March, 1909. At the conclusion of the trial at the request of the defendant four special interrogatories in writing were submitted to the jury to be answered, as follows:

"A. Did Louis Greenberg commit an assault upon the plaintiff, Minnie Connor?

"B. Did Louis Greenberg have an execution against Minnie Connor, and in favor of Clark & Doran?

"C. Did Louis Greenberg imprison or arrest Minnie Connor?

"D. Was the outer door broken by Constable Louis Greenberg?"

The jury, on March 25, 1909, returned a general verdict finding the defendant guilty and assessing plaintiff's damages at the sum of \$3,000, and in their special

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

findings answered all of said interrogatories in the affirmative. Defendant's motion for a new trial was not finally passed upon until February 3, 1910, at which time that motion and his motion in arrest of judgment were overruled and the court entered judgment upon the verdict.

From the judgment defendant prayed an appeal and perfected the same in this court, but on July 10, 1912, said appeal was dismissed by this court upon his motion. He having been arrested on a *capias ad satisfaciendum* issued on said judgment, and his petition for release from custody under the Insolvent Debtor's Act having been dismissed by the County Court of Cook county, he prayed an appeal from that judgment of dismissal to this court, and on November 10, 1914, said judgment of the County Court was affirmed. (*Greenberg v. Connor*, 189 Ill. App. 419.) In the meantime, on February 1, 1913, he sued out this present writ of error to review said judgment of the Circuit Court, and the cause was continued from term to term for want of service on plaintiff (defendant in error). On January 14, 1915, on defendant's motion the writ of error was made a *supersedeas*, defendant having filed a bond with surety in the sum of \$5,000, and on May 11, 1915, publication having been made, plaintiff entered her appearance in this court.

The declaration consists of four counts. The first count alleges, in substance, that defendant, on April 20, 1904, "with force and arms, etc., broke and entered a certain dwelling house of the plaintiff," and stayed and continued therein, making a great noise and disturbance, for the space of three days; that defendant "forced and broke open and broke to pieces and damaged the outer doors" of said dwelling house, and "broke to pieces, damaged and spoiled divers locks, staples and hinges" belonging to said doors and where-with the same were fastened; that defendant, also,

during said time, with force and arms, "seized and took divers goods and chattels" (here are specifically mentioned more than 100 articles including one piano, several oriental rugs, household furniture and \$52 in money) "being the goods of plaintiff then found and being in said dwelling house and being of the value of \$2,500, and carried away the same and converted and disposed thereof to his own use;" by means whereof plaintiff and her family were not only greatly disturbed in the peaceable possession of plaintiff's dwelling house but plaintiff was "hindered and prevented from carrying on and transacting therein her necessary affairs and business and has * * * been thereby deprived of her said dwelling house from hence hitherto, and * * * the business of plaintiff, being that of a boarding house keeper, was completely broken up and destroyed."

The second count alleges that on the date aforesaid defendant made an assault upon plaintiff and beat and illtreated her, and imprisoned her without any reasonable cause for the space of seven hours. The third count charges, in substance, that defendant assaulted plaintiff, seized her and with great violence dragged her about and struck her, and also forced her to go out on the public streets then and there in custody, whereby she was not only bruised and wounded but was exposed to public disgrace and injured in her standing and reputation. The fourth count charges an assault and battery by defendant.

The defendant filed a plea of the general issue to all four counts, and also a special plea "as to the *first* count of plaintiff's declaration and as to the alleged wrongful taking of the property hereinafter named," in which he alleged, in substance, that on February 16, 1904, Clark & Doran sued out of the justice court of W. D. Wilcox, a justice of the peace in said Cook county, a writ of *feri facias*, commanding any con-

stable of said county that of the goods and chattels of said plaintiff there should be made the sum of \$133.20, and \$4.50 costs, within seventy days; that defendant was then and thereafter a constable of said county and said writ was delivered to him to execute; that afterwards and before the return day of said writ, on April 20, 1904, defendant as such constable "peaceably and quietly entered into the said dwelling house, in which, etc., the outer door thereof being then open," and seized and took in execution the following goods and chattels of plaintiff, viz.: "1 piano, 1 piano stool, 2 rugs 9 x 12, two wardrobes, one hat rack and 2 small rugs," the same being in said dwelling house and liable to be seized and taken by virtue of said writ; that in so doing he necessarily and unavoidably made a little noise in said dwelling house but did no unnecessary damage to plaintiff; and that afterwards, after due notice given according to law, he sold said goods and chattels, and satisfied said judgment and costs.

To this special plea of justification plaintiff filed a replication in which she alleged that "although true it is that said writ of *feri facias* was issued and delivered to the defendant as such constable * * * nevertheless * * * the plaintiff says that the defendant, at the time when, etc., of his own wrong and without the residue of the cause in that plea alleged, committed the trespasses in said declaration mentioned, in manner and form as the plaintiff has hereinabove complained against the defendant," etc.

The testimony of plaintiff and her witnesses disclosed, in substance, the following facts: On and prior to April 20, 1904, plaintiff conducted a boarding and lodging house on Ashland boulevard, between Jackson and Van Buren streets, Chicago. There were fifteen rooms in the house and ten boarders. Plaintiff's net income from her boarders and roomers at the time was about \$100 per month. At the front entrance to the

house there were two permanent doors. They were both "double doors," one set opening into a vestibule and the other set opening from the vestibule into the main hall of the house. Outside of the first mentioned double doors were temporary double "storm" doors which opened outwards. About 8:30 o'clock on the morning of April 20, 1904, plaintiff was standing on the front porch. The storm doors were open. Both sets of double doors were locked. Defendant, accompanied by William Snyder, another constable, came upon the porch where plaintiff was. Other men, assistants of defendant, were on the sidewalk. Defendant stated to plaintiff that he had an execution against her in favor of Clark & Doran for over \$133, demanded that plaintiff open the doors and let him inside of the house, took hold of plaintiff's arm and further stated that she was his prisoner. Upon plaintiff's refusal to open the doors defendant directed Snyder and his other assistants to break in the doors, and they first broke open the double doors leading into the vestibule. In the meantime, at plaintiff's request, her daughter, standing inside in the hall, had "put the chain on" the doors opening from the vestibule into said hall. Defendant's assistants afterwards by pushing a ladder against said doors, succeeded in breaking open the same and in so doing broke off a portion of one of said doors and broke said chain. After gaining admission into the hall defendant again took hold of plaintiff's arm and again stated that she was under arrest, and demanded that \$200 be paid him, otherwise he would carry away the household effects and sell them. Subsequently plaintiff paid defendant \$40 and received from him a written receipt therefor. Plaintiff then requested that she be allowed to go down town and see her attorney and endeavor to procure more money. Defendant refused to permit her to go except in the custody of Constable Snyder, who accompanied her in a buggy to said attorney's office. In the inter-

view there had Snyder told said attorney that plaintiff was under arrest, that both defendant and he had executions and that if money was not forthcoming they were going "to clean out that place," and referred him to defendant for further information. Snyder accompanied plaintiff on the return to her home, where plaintiff again saw defendant and asked for additional time to procure more money. Defendant said he would put in a custodian at \$10 per day, which he did for one day. Plaintiff paid \$12 in all to the custodian. On the afternoon of the following day defendant, accompanied by Snyder and other men, again came to plaintiff's home. Two large moving vans of the Livingston Express and Storage Company were drawn up in front of the house, and during the afternoon there were taken and carried away in said vans and in buggies 100 articles of household furniture belonging to plaintiff. As one witness stated, "they took almost everything." Plaintiff, after enumerating various chattels taken, testified that the fair market value of the same at the time was \$2,600. This testimony as to value was not contradicted. No part of the property was returned to plaintiff and she did not continue in her business as a boarding house keeper.

The defendant claimed the protection of the execution issued by W. D. Wilcox, a justice of the peace, on a judgment against plaintiff and in favor of Clark & Doran for \$133.20 and costs. This paper was in the possession of the defendant and on the trial was offered in evidence by him. It does not appear to have ever been returned to said justice. On the back of the paper is a statement over defendant's signature that on April 20, 1904, he levied on certain specific personal property of plaintiff (mentioning the same 9 articles as stated in his plea of justification). Below is the further statement that the sale is set for May 3, 1904. Defendant testified that he advertised and sold the property levied

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upon and that *he* took no other property. The theory of the defense was that the other property of plaintiff which was carted away was taken by Constable Snyder, who claimed to have another execution for \$193 issued by said justice of the peace against plaintiff and in favor of one Anderson. Snyder testified that he made a levy at the same time that defendant made his levy on the Clark & Doran execution. The Anderson execution was not produced. Snyder further testified that he returned it into court, but that he had not made a search to find it or ask the justice to do so. It appeared, however, from the original record of said justice in said Anderson case and from a transcript thereof, certified to by the justice nearly eight months after the alleged levy, that the Anderson execution was issued to *defendant*, as constable, on April 7, 1904, but it did not appear from said record or transcript that the execution had ever been returned.

Both defendant and Snyder testified to the effect that they did not break open the doors which opened into the vestibule; that these doors they found open when they arrived; that they demanded of plaintiff that she open the two doors which opened into the hall from the vestibule; and that upon her refusal they broke open these doors and entered. Both denied that they, or any one for them, laid hands on plaintiff, or stated that she was under arrest, or that they at any time arrested her. Both testified that the property taken away from plaintiff's house was temporarily stored in the warehouse of the Livingston Company, and evidence was introduced on behalf of defendant tending to show that all the property taken, except the 9 articles alone claimed to have been levied upon and taken by defendant, were stored with said company in the name of Snyder. Plaintiff, however, testified that a day or two after her property was taken she called at the office of the Livingston Company and there saw an entry in a warehouse receipt book that her goods

were there stored in the name of defendant. Plaintiff also introduced in evidence a sheet from a certain loose-leaf warehouse receipt book of said Livingston Company, which purported to be a carbon copy of a warehouse receipt given by said company on April 22, 1904, for 78 articles of household furniture. Among the articles enumerated are: "1 piano, 1 piano stool, 2 wardrobes and 1 hat rack," which articles defendant claimed he levied on. This sheet was identified by John L. Livingston of said company. He testified that all of said articles were taken directly from plaintiff's house and stored in the company's warehouse. It clearly appears that the receipt as originally written was given to "Greenberg," and that said name has been partially erased and the name "Wm. Snyder" written over the erasure.

MARTIN C. CONNOR, for appellant.

WILLIAM J. STAPLETON, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

First. It is contended by counsel for defendant that because plaintiff, in her replication to defendant's plea of justification to the declaration, failed to "new assign," no recovery can be had by plaintiff. The statement as to defendant's plea being filed to the *declaration* is not accurate. The declaration contained four counts to which defendant pleaded the general issue, and his special plea of justification was filed only to the *first* count. After due consideration we do not think that counsel's point is well taken.

The first count of plaintiff's declaration charged, in substance, that defendant, with force and arms, etc., broke and entered plaintiff's dwelling house, forced and broke open the *outer* doors of said house, and therein seized and carried away over 100 articles of

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household furniture, the property of plaintiff, and converted the same to his own use, whereby she suffered damages as alleged. Defendant's plea of justification to this count alleged, in substance, that, by virtue of an execution for \$133.20, issued by a justice of the peace to him as a constable, he as such constable peaceably and quietly entered plaintiff's dwelling house, "the *outer* door thereof being then open," and seized and took away under said execution 9 articles of household furniture mentioned, belonging to plaintiff, and subsequently sold the same, etc. The fact that defendant as a constable was armed with a writ of *feri facias* would not justify him, for the purpose of executing such a writ, in breaking the outer door of plaintiff's dwelling house; if, however, he found such *outer* door open, and he gained a peaceable entry into the house, and he found that an *inner* door was closed so that he could not seize any of plaintiff's goods, then he could have demanded of plaintiff that said inner door be opened, and upon her refusal he could have opened that door and seized a sufficient amount of plaintiff's goods to satisfy the amount of said writ and costs. (*Snydacker v. Brosse*, 51 Ill. 357, 361.) If he broke the *outer* door, and thereby gained an entrance into plaintiff's house, he became a trespasser *ab initio*, and liable not only for the property taken by him but also for any damage to plaintiff which was the immediate result of his acts. (*Snydacker v. Brosse*, *supra*; *Greenberg v. Connor*, 189 Ill. App. 419.) The averment in defendant's plea (viz., the *outer* door of plaintiff's house being *open* at the time he entered) was a material one, as that fact, if it was a fact, was a condition precedent to his right to enter plaintiff's house. (*Kerbey v. Denby*, 1 Meeson & W. Rep. 336.) To this plea the plaintiff filed a replication, in which she admitted that it was true as defendant had stated in his plea that he had the writ, but further alleged that nevertheless the defendant, at the time when, etc., "of his own wrong,

and without the residue of the cause in that plea alleged, committed the trespasses in said declaration mentioned, *in manner and form as the plaintiff has hereinabove complained against the defendant.*” In other words, she alleged that notwithstanding defendant had the writ mentioned, nevertheless he committed the trespasses as alleged in her declaration, in the first count of which there was contained the distinct allegation that he forced and broke open the *outer* doors of her house. We think it was unnecessary for her to again specifically charge in the replication that defendant broke the outer doors. (*Kerbey v. Denby, supra.*) And we think that the issue of fact as to whether defendant broke the outer doors was sufficiently presented. “In trespass * * * the replication containing a general denial of the *whole* plea sometimes occurs, and is termed a replication *de injuria sua propria absque tali causa*, * * * or, if a *part* of the plea be admitted, then it is termed *de injuria absque residuo causa*, thereby denying all but the admitted fact or facts. This replication tenders issue upon and compels the defendant to prove every material allegation in his plea.” (1 Chitty on Pl., 16th Am. Ed., star p. 632-3.) “If in any case the defendant justified under the warrant of a justice of the peace, * * * or by his command, the replication must have been special, and admit or protest the warrant or commandment, and reply *de injuria absque residuo causa*, or take issue simply on the warrant or commandment.” (Id., star p. 636.) “There are some replications which rather partake of the nature of new assignments than are properly and strictly so. As where the defendant has abused an authority or license which the law gives him, by which he became a trespasser *ab initio*. In an action brought for a trespass thus committed, where the defendant pleads the license or authority, the plaintiff may *reply* the abuse. Such a replication it will be observed differs from a new assignment, because it

does not operate in any manner as a waiver or abandonment of the trespass attempted to be justified, but states matter in confession and avoidance of the justification.” (Id. p. 665.) Furthermore, defendant did not demur to plaintiff’s replication. “Where *de injuria* is improperly replied, the defendant may demur specially, but the defect will be aided after verdict.” (Id. p. 639.)

Second. It is also contended that the trial court erred in allowing plaintiff to testify that she had no knowledge or recollection of any summons ever having been served upon her in the action brought against her by Clark & Doran in the justice court. We do not think, even if the court erred in his ruling, that defendant was so prejudiced thereby as to warrant a reversal, in view of the instructions subsequently given to the jury. Several of plaintiff’s instructions were predicated upon the assumption that defendant had a valid writ of execution. Of the instructions given on behalf of the defendant the second told the jury that the writ of execution introduced in evidence was valid and authorized defendant, as a constable, to levy upon and take goods of plaintiff to satisfy the writ; and the eighth, that if the jury believed from the evidence that the plaintiff was not served with a summons in the Clark & Doran case, still the writ of execution in defendant’s hands would be a protection to him in levying upon plaintiff’s property although as a matter of fact there was no service upon her.

Third. It is further contended that the trial court erred in giving three instructions offered by plaintiff and in modifying an instruction offered by defendant.

Plaintiff’s seventh given instruction is as follows:

“The court instructs the jury as a matter of law that an officer in levying an execution within a dwelling house must make a peaceable entry and has no right to break open an outer door or other outside protection of such dwelling house, and if the jury believe from the

evidence in this case that the defendant broke open or caused to be broken open the outer door or other outside protection of the plaintiff's dwelling house in levying the writ or writs of execution in question, then all acts thereafter done pursuant to said wrongful entry, if the jury believe from the evidence there was such wrongful entry under said writ or writs by the defendant or by his direction, were unlawful. What constituted the outer door or other outside protection of the plaintiff's dwelling house is a question of fact for the jury."

Counsel for defendant contend that this instruction was prejudicial because (1) it assumes that the boarding house kept by plaintiff was a "dwelling house," and (2) because it left to the jury to decide, under the evidence, that an inner door might be an outer door, and therefore was misleading. The evidence clearly shows that the house in question was plaintiff's dwelling house. She resided therein with her family. We do not think that the mere fact that she rented certain rooms to others and also kept boarders made it any less a dwelling house. (*State v. Leedy*, 95 Mo. 76, 78.) The term "dwelling house" is defined in Webster's Dictionary as "a house intended to be occupied as a residence, in distinction from a store, office, or other building;" and in Bouvier's Law Dictionary as "a house usually occupied by the person there residing, and his family; the apartment, building, or cluster of buildings in which a man with his family resides." And it was not disputed on the trial that plaintiff occupied the house as her dwelling house, and defendant in his plea of justification stated that the articles which he seized and took in execution were in "said dwelling house."

The second objection to the instruction evidently has reference to the last sentence thereof. As we understand it the argument is, inasmuch as the evidence was conflicting on the question whether defendant broke in

the double doors entering *into the vestibule*, and as there was no dispute as to the breaking in of the double doors leading from the vestibule *into the hall*, that by the instruction the jury might have thought that said last mentioned doors were *outer* doors, and that the court should have told the jury by an appropriate instruction which of the two sets of doors were the *outer* and which the *inner*, instead of submitting this question to the jury to decide. We do not think that the defendant was prejudiced by the instruction. In *Snyder v. Brosse*, 51 Ill. 357, 359, it is said: "It is a uniformly recognized rule of the common law, that no officer has the legal authority to break an *outer door*, or other *outside protection*, to an individual's house, for the purpose of executing civil process." In our opinion, under the facts shown, the double doors leading from the vestibule into the hall are to be considered in law as much the "outer door or other *outside protection*" to plaintiff's house as the other outer doors leading into the vestibule. An entrance into the *inside* of plaintiff's house could not be effected by reaching the vestibule which is outside of the doors opening *into* the main hall of the house. There is therefore no basis for counsel's objection to the instruction.

Complaint is made of the giving of the tenth instruction offered by plaintiff. By it the jury were told that if they found the issues for the plaintiff, and that if they further found from the evidence that plaintiff had an established business which was injured or destroyed as the proximate result of the acts of defendant in taking plaintiff's goods, they might assess such damages, if any, proximately accruing to plaintiff from such loss of business. Counsel's argument against the instruction is based on the assumption that he lawfully entered plaintiff's house and made a lawful levy on plaintiff's goods. Under the facts shown we do not

think there was error in the giving of the instruction. (*Snydacker v. Brosse*, 51 Ill. 357, 361.)

It is also contended that the giving of the fifth instruction offered by plaintiff tended to mislead the jury. As the portion complained of is predicated upon the assumption that defendant made a peaceable entry into plaintiff's house, and the jury found in one of their special findings that he broke the outer door thereof, we do not think that the defendant could have been prejudiced by the giving of the instruction. Furthermore, we think the jury were properly instructed as to the measure of damages for property unlawfully taken.

Complaint is also made of the fact that the court refused to give defendant's thirteenth instruction, as offered, but modified it by inserting therein certain words and giving it to the jury as modified. We do not think that the defendant was at all prejudiced by the action of the court.

Fourth. It is further contended that the verdict is against the weight of the evidence. We do not think so.

The above are all the points urged and argued in the brief of defendant's counsel as grounds for a reversal of the judgment. Finding no reversible error in the record the judgment of the Circuit Court is affirmed.

Affirmed.

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**The People of the State of Illinois, State Board of
Examiners of Architects, Defendant in Error, v.
Rodgers Company, Plaintiff in Error.**

Gen. No. 21,148.

ARCHITECTS AND ENGINEERS,—*when corporation not guilty of practicing architecture without a license.* Under Hurd's Rev. St. Ch. 10a, sec. 5 (J. & A. ¶ 479), relative to the licensing of architects, a corporation does not incur the penalty provided in section 8 of such chapter (J. & A. ¶ 482) for practicing architecture without a license, when it makes a contract for the doing of architectural work and the work is actually performed by and under the direction of a duly licensed architect, who is an employee of the corporation.

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed. Opinion filed February 24, 1916.

RALPH D. STEVENSON and ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for plaintiff in error; CALHOUN, LYFORD & SHEEAN, of counsel.

JOHN J. FALVEY, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

On June 23, 1914, the present action was commenced in the Municipal Court of Chicago against the Rodgers Company, an Illinois corporation. As stated in the statement of claim, plaintiff's claim is for a penalty, not exceeding two hundred dollars, "for a violation by defendant of the statutes of the State of Illinois, Section 5 of Chapter 10a [J. & A. ¶ 479] of an act to provide for the licensing of architects and regulating the practice of architecture as a profession," in that

defendant on June 16, 1914, "was engaged in the practice of architecture, and, at Chicago, Illinois, did furnish plans and did enter into a contract to build and supervise the construction of a building at Niles, Illinois, all in violation of the aforesaid act." The defendant denied in its affidavit of merits that at the time mentioned, or at any other time, it was engaged in the practice of architecture in violation of the statute. The case was tried before the court without a jury, resulting in the defendant being adjudged to pay a fine of fifty dollars, which judgment it is sought by this writ to reverse.

There is no dispute as to the material facts. The Rodgers Company, defendant, is a corporation, organized on April 10, 1908, under the general incorporation act of this State for the purpose of carrying on the business of consulting engineering building and construction work of all kinds. On May 6, 1914, it entered into a written contract with the Catholic Bishop of Chicago, a corporation sole, to perform, upon the terms and conditions therein stated, all the necessary and usual architectural services in connection with the construction of a building about to be erected at Niles, Illinois, for said Catholic Bishop of Chicago, owner. Subsequently it furnished the owner with plans and specifications for the work to be done. The plans were all prepared by and under the direction and supervision of one K. M. Vitzthum, a duly licensed architect of the State of Illinois. Vitzthum was an employee of defendant and all of said plans and specifications were signed by him and sealed with his seal as a licensed architect.

In section 4 (J. & A. ¶ 478) of the act in question, the character of the examination to be taken by applicants for license to practice architecture is set forth, and it is provided that "any person over twenty-one years of age," upon payment of a fee, shall be entitled to an examination for determining his or her qualifications,

and it is further provided that if the result of the examination of any applicant be satisfactory to a majority of the State Board of Examiners of Architects, under its rules, the secretary upon order of the board shall issue to the applicant a certificate to that effect, and upon payment of a fee he shall thereupon issue to the person named therein a license to practice architecture in the State, in accordance with the provisions of the act, which license shall contain "the full name, birth place and age of the applicant," etc.

In section 5 (which is the section mentioned in plaintiff's statement of claim) provision is made for the licensing of persons who were engaged in the practice of the profession of architecture when the act was passed. Then it is provided: "In the case of a co-partnership of architects, each member *whose name appears* must be licensed to practice architecture." Then it is provided: "No stock company or corporation shall be *licensed* to practice architecture, *but the same may employ licensed architects.*" (J. & A. ¶ 479.) Then follow provisions requiring each licensed architect to have his or her license recorded, and that the failure so to do shall be deemed sufficient cause for revocation of the license.

In section 7 (J. & A. ¶ 481) it is provided that every licensed architect shall have a seal, the impressions of which must contain the name of the architect, his or her place of business, and the words, "Licensed Architect, State of Illinois," with which he shall stamp all drawings and specifications issued from his office for use in this State.

In section 8 (J. & A. ¶ 482) it is provided that after six months from the passage of the act it shall be unlawful, and it shall be a misdemeanor punishable by fine of not less than ten dollars nor more than two hundred dollars for each and every offense, "for any *person* to practice architecture without a license in this State, or to advertise, or to put out any sign or card

or other device which might indicate to the public that he or she is entitled to practice as an architect.”

In section 9 (J. & A. ¶ 483) it is stated that any person engaged in the planning or supervision of the erection, enlargement or alteration of buildings for others and to be constructed by other persons than himself shall be regarded as an architect within the provisions of the act; and it is provided that nothing contained in the act shall prevent draughtsmen, students, clerks of works or superintendents, and other employees of those lawfully practicing as architects under license, from acting under the instruction, control or supervision of their employers; or prevent the employment of superintendents of buildings paid by the owners from acting, if under the control and direction of a licensed architect who has prepared the drawings and specifications for the building; or prevent any person, mechanic or builder from making plans and specifications for, or supervising the erection, enlargement or alteration of any building that is to be constructed by himself or employees.

In section 10 (J. & A. ¶ 484) provision is made for the revocation and cancellation of licenses, and in section 11 (J. & A. ¶ 485) for the renewal of licenses annually.

It is urged by counsel for the defendant that the trial court erred in entering the judgment for the reason that under the facts shown the defendant is not guilty of a violation of the act in question. The contention is, that while a corporation as such cannot be *licensed* to practice architecture any more than it could be licensed to practice dentistry or pharmacy, not only because of the provision contained in section 5 of the act (J. & A. ¶ 479) but also because of its impersonal entity, yet a corporation may lawfully enter into a contract for the furnishing of architectural plans and specifications and perform such contract by employing a licensed architect to do the work, and in so doing is

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not practicing architecture in violation of the provisions of said act. Counsel for defendant direct particular attention to the clause in section 5 of the act (J. & A. ¶ 479) as follows: “No stock company or corporation shall be *licensed* to practice architecture, *but the same may employ licensed architects.*” And counsel argue that it was evidently not the intention of the Legislature to prohibit a corporation from doing architectural work for others, provided such work is done by licensed architects in the employ of the corporation, first, because the evident purpose of the act is the protecting of the public by preventing incompetent and unskilful men from engaging in the practice of architecture, which purpose is accomplished where the architectural work is actually performed by a duly licensed architect; second, because the prohibition in said section 5 is only against a corporation being *licensed* to practice architecture, the purpose of which is obvious, as a corporation being an impersonal entity cannot appear before an examining board and answer questions and meet the other requirements mentioned in section 4 of the act; and third, because by the provision that a corporation “may employ licensed architects” the Legislature expressly recognized the right of a corporation to do architectural work for others by employing licensed architects. Counsel for plaintiff, in their endeavor to explain the purpose and meaning of the clause that a corporation “may employ licensed architects,” contend that this was intended merely to authorize corporations, such as railroads and large industrial corporations, to employ licensed architects in connection with their own business enterprises. But in our opinion the contention is without merit, because no such provision was necessary as corporations always had that right.

After due consideration we have reached the conclusion that the defendant corporation was not guilty of any violation of the act and that the trial court erred

in entering a judgment against it. The proof showed that while the corporation made the contract for the doing of the architectural work mentioned, the work was actually performed by and under the direction of a duly licensed architect, who was an employee of the corporation.

By other legislative enactments and judicial decisions it has been recognized that corporations may engage in callings of a similar nature to that of practicing architecture in which licenses to individuals are required. By statute of this State it is provided that dentists shall be examined and licensed before practicing, and although a corporation as such cannot receive such a license, yet it is recognized that corporations may engage in the practice of dentistry by employing licensed dentists to do the work. (Hurd's St. 1913, ch. 91, secs. 37 and 44, pp. 1612, 1615, J. & A. ¶ 7435, 7450; *Hubbard v. Martin*, 184 Ill. App. 534.) So with pharmacists. (Hurd's St. 1913, ch. 91, sec. 19, p. 1606, J. & A. ¶ 7413.) And by a recent act of the Legislature (Laws of Illinois, 1915, p. 432) provision is made for the licensing of structural engineers. In section 10 of that act it is provided that while no corporation shall be licensed to practice structural engineering, yet it may prepare drawings, plans, etc., for buildings and structures if its chief executive officer or managing agent in the State shall be a structural engineer, licensed under said act.

In the State of Nebraska it is provided by statute that "it shall be unlawful for any *person* to practice medicine, surgery or obstetrics or any of the branches thereof, in this State, without first having applied for and obtained from the State Board of Health a license so to do." In *State Electro-Medical Institute v. State*, 74 Neb. 40, it is decided (1) that while a corporation is in some sense a person and for many purposes is so considered, yet it is not such a person as can be licensed to practice medicine; and (2) that the making

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by a corporation of contracts to furnish the services of qualified physicians duly licensed under said statute, and the furnishing of such services by the corporation, is not a violation of such statute. The court says (p. 43): "The intention of the law is that one who undertakes to judge the nature of a disease, or to determine the proper remedy therefor, or to apply the remedy, must have certain personal qualifications, and if he does these things without having complied with the law he is subject to its penalties. Making contracts is not practicing medicine. Collecting the compensation therefor is not practicing medicine within the meaning of this statute." In *State Electro-Medical Institute v. Platner*, 74 Neb. 23, it is also decided that the contracts of a corporation to furnish the services of qualified and licensed physicians, members of the corporation or its agents, for an agreed compensation, are not prohibited by the statutes of that State, nor are they against public policy. We think that these decisions, in principle, are pertinent to the question presented in the instant case. (See also, *Crall & Ostrander v. Commonwealth*, 103 Va. 855; *Davidson v. State*, 77 Md. 388.)

Counsel for plaintiff place considerable reliance on the case *In re Co-operative Law Company*, 198 N. Y. 479, but we do not think the case is much in point. By statute of the State of New York it was made unlawful for any corporation to practice law, to render or furnish legal services or advice, to furnish attorneys or counselors for that purpose, or to advertise for or solicit legal business, and it was held in the above case that, "a corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it." Apparently the public policy of the State of New York as to corporations practicing dentistry, etc., is different

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from that of this State as evidenced by our statutes concerning the licensing of dentists, pharmacists and structural engineers, and the licensing of architects under the act in question.

The judgment of the Municipal Court is reversed.

Reversed.

Peter Cristofano and Vincent Di Cicco for use of Peter Christofano, Defendants in Error, v. William Anton and James Anton, Plaintiffs in Error.

Gen. No. 21,227. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 24, 1916.

Statement of the Case.

Action on account stated and for goods sold and delivered by Peter Cristofano and Vincent Di Cicco for use of Peter Christofano, plaintiffs, against William Anton and James Anton, defendants. From a judgment against both defendants, James Anton brings error.

A third codefendant, Nick Anton, was not served with process. While the statement of claim in the Municipal Court showed the plaintiffs to be "Peter Cristofano and Vincent Di Cicco for the use of Peter Christofano," the summons merely called defendants to answer unto "Peter Christofano." Defendant, who appeals, appeared and filed affidavits.

W. A. MORROW, for plaintiff in error James Anton.

Ehrlich v. Lakeside Fish & Oyster Co., 198 Ill. App. 152.

LAURENCE M. FINE and EDWARD DROBNIS, for defendants in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 196*—*when judgment may be entered against defendants served.* The trial court may enter judgment against two defendants, in action on account stated and for goods sold and delivered, notwithstanding that a third codefendant was not served with process.

2. MUNICIPAL COURT OF CHICAGO,—*when question of variance between statement of claim and summons cannot be raised.* Variance between a summons in an action in the Municipal Court of Chicago, which directs defendants to answer unto "Peter Christofano" and a statement of claim which alleges plaintiffs to be Peter Cristofano and one other for the use of Peter Christofano, cannot be raised after defendants have filed affidavit of merits nor after the finding by motion in arrest of judgment.

Nate H. Ehrlich, Defendant in Error, v. Lakeside Fish & Oyster Company, Plaintiff in Error.

Gen. No. 21,239. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 24, 1916.

Statement of the Case.

Action by Nate H. Ehrlich, plaintiff, against Lakeside Fish & Oyster Company, defendant, to recover \$375.02 for two consignments of fish sold and delivered to defendant. From a judgment for plaintiff, defendant seeks writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ehrlich v. Lakeside Fish & Oyster Co., 198 Ill. App. 152.

At the beginning of the trial the attorney for defendant admitted that defendant had received the fish and that the number of pounds charged for was correct, and stated in substance that the only question in the case was whether plaintiff was the vendor of the fish or plaintiff's parents, M. Ehrlich and Fannie Ehrlich; in other words, whether immediately prior to the sale and delivery plaintiff was the owner thereof or plaintiff's parents. Thereupon the court suggested that this issue had better be determined by a jury, and the trial proceeded before a jury. The jury returned a verdict in favor of plaintiff and assessed his damages at the sum of \$375.02, upon which verdict the court entered judgment against the defendant.

HAROLD J. FINDER, for plaintiff in error.

TONE & CHALLENGER, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1236***—*when defendant estopped to assert insufficiency of evidence to sustain verdict.* Where counsel for defendant admits the amount claimed by plaintiff, he cannot be heard in the Appellate Court to contend that the evidence did not warrant a verdict or judgment for such sum.

2. **EVIDENCE, § 255***—*when entries in account books kept by purchaser of goods not admissible against seller in action.* In an action to recover on an account for merchandise sold and delivered to defendant, entries in account books kept by the purchaser are not admissible in evidence against the seller.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**Donald A. Curran, Appellee, v. Chicago Short Line
Railway Company, Appellant.**

Gen. No. 20,970.

1. **COMMERCE, § 4***—*when railroad engaged in interstate commerce.* In an action brought under the Federal Employers' Liability Act to recover for personal injuries alleged to have been sustained by reason of the fact that the car causing the injuries was not equipped with a coupler coupling automatically on impact, as required by such act, the fact that the evidence is conflicting as to what railroad was the owner of the car causing the injury is immaterial, as far as the application of such act is concerned, where it appears that such car is owned by one or the other of two railroads, both of which are engaged in interstate commerce.

2. **COMMERCE, § 4***—*when railroad engaged in interstate commerce.* Where freight cars from railroads engaged in interstate commerce are received by defendant, who participates in the transportation to destination, and where defendant moved a car to be weighed for the purpose of determining the net weight of an interstate load and where there was no proof that the car being weighed had been withdrawn from service in interstate commerce, *held* that the moving of such car is a part of the interstate commerce in which defendant is engaged, within the meaning of the Federal Employers' Liability Act, requiring such cars to be equipped with couplers coupling automatically on impact.

3. **MASTER AND SERVANT, § 760***—*when proximate cause of injury to brakeman coupling cars question for jury.* In an action brought under the Federal Employers' Liability Act to recover for personal injuries sustained by plaintiff, a freight brakeman, while coupling a car alleged to be equipped with a coupler not coupling automatically on impact, as required by the statute, where the evidence was conflicting as to whether the proximate cause of the accident resulting in the injuries for which recovery is sought was the defective coupler, requiring plaintiff to go between the cars in order to make the coupling, or the fact that as plaintiff signaled the engineer to start the train he slipped on a piece of coal, causing his foot to slide under the wheel of the car as the wheel began to move, the question of proximate cause was one for the jury.

4. **MASTER AND SERVANT, § 689***—*when evidence insufficient to establish defectiveness of coupling belonging to freight train.* In an action brought under the Federal Employers' Liability Act to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Curran v. Chicago Short Line Ry. Co., 198 Ill. App. 154.

recover for personal injuries sustained while plaintiff, a freight brakeman, was engaged in coupling a car alleged to be equipped with a coupler not coupling automatically on impact, as required by the statute, evidence *held* to preponderate against plaintiff's contention that the coupler in question was a defective appliance.

5. MASTER AND SERVANT, § 689*—*when evidence sufficient to sustain finding of negligence in not providing suitable coupler.* Under the Federal Employers' Liability Act, proof of a failure of a coupler to couple automatically on impact makes prima facie case of negligence, but does not preclude defendant from rebutting same.

6. APPEAL AND ERROR, § 1034*—*when judicial notice will not be taken of manner of construction of railroad couplings.* The Appellate Court will not take judicial notice of the difference in construction or mechanism of couplers when the record is silent on the question.

7. WITNESSES, § 254*—*when jury may not reject testimony of witnesses.* The prerogative of the jury to determine the credibility of witnesses does not justify an arbitrary rejection of testimony of witnesses, who have not been discredited, and the logical inferences from such testimony, especially when reasonable, corroborated, uncontradicted, and opposed at points of difference only by the unsupported testimony of a solitary, interested witness.

8. MASTER AND SERVANT, § 689*—*when evidence insufficient to sustain finding that car coupler was defective.* In an action brought under the Federal Employers' Liability Act to recover for injuries sustained by plaintiff, a freight brakeman, while attempting to couple a car alleged to have been equipped with a coupler not coupling automatically on impact, as required by the statute, where plaintiff's evidence as to the defect was limited to proof that at the time of the accident the coupler failed to couple automatically on impact, and defendant offered affirmative evidence tending to show that the coupler in question was not defective, a verdict for plaintiff *held* manifestly against the weight of the evidence.

On Petition for Rehearing.

APPEAL AND ERROR, § 1740*—*when Appellate Court will not depart from customary practice and follow Federal practice.* The Appellate Court will not depart from practice that has always obtained in appellate tribunals in this State in respect to finding the facts and entering judgment in a case predicated on a Federal statute, where it is contended that such practice violates the right to trial by jury guarantied by the seventh amendment of the Federal Con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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stitution, and that the Appellate Court should conform to the practice of the Federal courts in that regard.

Appeal from the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed with finding of fact. Opinion filed February 24, 1916. Rehearing denied March 4, 1916. *Certiorari* denied by Supreme Court (making opinion final).

WEST & ECKHART, for appellant.

MORSE IVES, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

This appeal is from a judgment for \$5,000 damages for personal injuries received by appellee (plaintiff), a brakeman in the employ of appellant (defendant). The count of the declaration relied on is predicated on the Federal Employers' Liability Act and the Federal Safety Appliance Act. It charges, in substance, that defendant was a common carrier engaged in interstate commerce; that at the time of the accident both it and plaintiff, its brakeman, were engaged in interstate commerce; that defendant permitted one of the couplers on the car in question to be in a defective condition so that it would not couple automatically and could not be coupled without a brakeman going between said car and the one next to it; that plaintiff was thus obliged to go between the cars and while in the act of opening a coupler stepped and slipped on a piece of coke or coal and was caught under a wheel of one of said cars and thereby injured.

There was conflicting evidence as to the identity of the car, plaintiff's tending to show it belonged to the "Big Four" road, and defendant's, that it belonged to the "B. & O." The weight of the evidence supports defendant's contention. But as we view it, it is im-

material to the legal questions presented, to which of the two railroads so designated the car belonged, as both were engaged in interstate commerce and the car was received by defendant from one of them for delivery over its tracks to the consignee.

After the car was unloaded it was switched by defendant to the scale track in its yards to be weighed. At the north end of the scale track was a scale used for weighing cars. Standing on this track were three empty cars, the southernmost of which was a "coke" car. In a switching movement just before the accident by a crew to which plaintiff belonged, two empty flat cars were being pushed north on this track by an engine for the purpose of coupling to said coke car the north flat car on which plaintiff was riding. At the first impact the cars failed to couple. The engine came to a stop and plaintiff went between the flat car and the coke car to adjust the knuckle on the latter, and after adjusting it gave a signal to the engineer to go ahead, and while walking out stepped on a piece of coke or coal causing his left foot to slide under the wheel of the car just about the time of the second impact when again there was a failure to couple.

Appellant contends that the evidence fails to show that defendant was engaged in interstate commerce or that the car with the alleged defective coupler was being hauled or used on defendant's line in moving interstate traffic. There can be no question on this record as to the applicability of both Federal acts. As the car was used on a road engaged in interstate commerce, it was required by the Safety Appliance Act to be furnished with an automatic coupler (*Southern Ry. Co. v. United States*, 222 U. S. 20); and as defendant received loaded freight cars from roads engaged in interstate commerce and participated in the transportation to their place of destination, it was a common carrier engaged in interstate commerce. (*Devine v.*

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Chicago & C. River R. Co., 174 Ill. App. 324, and 259 Ill. 449; *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321.) Being so engaged, the additional test of the application of the Federal Employers' Liability Act was whether the work engaged in at the time of the injury was a part of the interstate commerce in which the carrier was engaged. (*Pedersen v. Delaware, L. & W. Ry. Co.*, 229 U. S. 146, 3 N. C. C. A. 779; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 10 N. C. C. A. 153.) The work being done was the moving of an empty car to be weighed in order to determine the net weight of an interstate load. Upon a very similar state of facts in *Wheeling Terminal Ry. Co. v. Russell*, 209 Fed. 795, 799, it was held that it not having been shown that the cars being weighed had been withdrawn from service in interstate commerce, the presumption was that they remained in it. There was no proof in the instant case tending to show any such withdrawal. Hence the same presumption must obtain.

Appellant also urges that defendant's negligence, if any, to maintain a proper appliance was not the proximate cause of injury, and that the court should have so held as a matter of law and have directed a verdict in its favor. The contention is that plaintiff's injury was due primarily to his negligently signaling the engineer to go ahead before he stepped out from between the cars; and secondarily, to his slipping on the piece of coal or coke. Both plaintiff's signaling at the time and place and his slipping on the piece of coal might be regarded as mere links in the chain of causation connecting defendant's alleged negligence to maintain properly its coupling appliance with plaintiff's injury, and thus present a question of fact as to which different conclusions might be reached, and therefore a question for the jury. (*Donegan v. Baltimore & N. Y. Ry. Co.*, 165 Fed. 869; *Erie R. Co. v. Russell*, 183 Fed. 722; *Grand Trunk Western Ry. Co. v. Lindsay*, 201 Fed. 836.)

But we agree with appellant that the preponderance of the evidence is manifestly against plaintiff's claim that there was a defective appliance. There was no question but that the car was furnished with automatic couplers and other appliances that obviated the necessity of going between the cars to couple or uncouple them provided they were in working order. The question of fact was, was there any defect therein so that they would not work if properly handled. Plaintiff alleged the existence of a defective condition. The burden was on him to prove the allegation. He made no attempt to prove any specific defect, but relied on making out a *prima facie* case. The unquestioned fact that the cars did not couple on impact was supplemented by plaintiff's testimony that as his car approached the coke car he observed that the couplers on both were in position to couple; that after they failed to couple on the first impact he found the device on the flat car operated properly but that the knuckle of the coke car was open, and the pin down; that he raised it, closed the knuckle and dropped the pin again, and that the cars failed to couple on the second impact, but that he "did not observe anything about the coupler as to why it opened." The proof of a defect, therefore, consisted entirely of the fact that the cars failed to couple automatically on impact, and plaintiff's testimony that the couplers were in a proper position for automatic coupling. If, however, as the uncontradicted evidence shows, the couplers operated automatically immediately before and immediately after the occasion in question, the palpable inference would be that the couplers were not placed in a proper position for coupling, for no matter how perfect the mechanism unless the couplers are in a position for coupling it cannot be effected with even automatic couplers. The duty of seeing that they were in such position manifestly rested upon the brakeman. If they

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were not, then the failure to couple on impact cannot be said to be due to a defect in the appliances.

It was said in *Chicago, R. I. & P. Ry. Co. v. Brown*, 229 U. S. 317, 3 N. C. C. A. 826, where a violation of the Safety Appliance Act was charged, that the *Taylor* case, 210 U. S. 281, and *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, settled "that the failure of a coupler to work at any time, sustains a charge of negligence in this respect." Citing these cases as authority, counsel for appellee seems to regard the mere fact of the failure of cars to couple on impact as conclusive of the question of negligence. It would be strange indeed, though it be the carrier's absolute duty to maintain the appliances required by said act, as held in said cases, if the carrier were not permitted to show in defense that it had performed such duty and that such failure was in fact due not to a defective appliance but to something else. Such proof is quite different from reliance on want of knowledge or exercise of due diligence, neither of which is a defense where the duty alleged to be violated is absolute. But proof that cars properly equipped to couple automatically did not couple on impact, while *prima facie* evidence of a violation of the act, is not conclusive of the fact that the appliances were out of order when the contrary is susceptible of proof.

Appellant contends that the alleged position of the coupler and pin on the coke car after the first impact was physically improbable if not impossible. We need not discuss the contention, for whether so or not, defendant was not precluded from rebutting the inference of negligence that might be drawn from plaintiff's proof, and we think it was completely refuted by affirmative and uncontradicted evidence that the appliances were in good working order.

Plaintiff himself testified that there was no difficulty in coupling or uncoupling this particular car on two occasions on the same day before the accident, one

before and one after it was unloaded, and a fellow switchman testifying to the same thing said also that there was no difficulty in coupling or uncoupling said car immediately after the accident—once when it was placed on the scales to be weighed and once when it was placed and left on another track. The yard inspector and the yard manager each testified that immediately after the accident, before the coke car in question was moved or anything done thereon, he examined its coupling appliances and found them in good order. The manager also testified that he then identified the car as a B. & O. car and took its number. There was proof that a B. & O. freight car of that number was inspected on its arrival at South Chicago by the B. & O. railroad inspector and again by another of its inspectors on January 3rd following, when it was delivered by defendant to the B. & O. railroad, and that the same car was inspected by defendant's inspector on December 26th when it arrived in defendant's yards as well as immediately after the accident, and that on each occasion the safety devices were found to be in good order.

Against the force of such evidence counsel for appellee argues that it was not inconsistent with an existing defect and that its credibility was for the jury to determine. In support of the first contention he calls attention to plaintiff's testimony that the coupler in question was a "Janney" coupler, and proceeds to argue that its construction is such that when certain parts are slightly worn the coupler will at times fail to operate on impact and on other occasions will operate without difficulty, but we find no evidence in the record on which to base such argument. The difference in construction or mechanism between a "Janney" and any other type of coupler is a subject on which the record is silent and of which we have no knowledge and cannot take judicial notice.

The credibility of defendant's witnesses was not di-

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rectly assailed, there was nothing inherently improbable in their testimony and they were not impeached nor directly contradicted. The jury's unquestioned prerogative of determining the credibility of witnesses does not justify an arbitrary rejection of testimony of witnesses who have in no way been discredited and the logical inferences therefrom, especially when it is reasonable, corroborated, uncontradicted, and opposed at the points of difference only by the unsupported testimony of a solitary, interested witness.

The failure of the cars to couple was attributable either to a specific defect not proven and which did not exist if defendant's evidence was true, or to a mistake or misrepresentation as to the position of one or both of the couplers before or after the impact. In his routine plaintiff may not have been particularly observant and could have been mistaken, and such a conclusion is most probable in view of the unquestioned evidence that the appliances not only worked perfectly just before and after the accident, but were examined and found in perfect condition immediately after it. Hence, we can reach no other conclusion than that the verdict was manifestly against the weight of the evidence. There is nothing in the record to indicate that other evidence on this subject is obtainable. In accordance, therefore, with the duty of this court to weigh the evidence and its power to render final judgment in such a case (*Borg v. Chicago, R. I. & P. Ry. Co.*, 162 Ill. 348; *Donelson v. East St. Louis Ry. Co.*, 235 Ill. 625), we reverse the judgment and find as a fact that defendant did not permit the couplers to be in a defective condition as alleged in the declaration.

Reversed with finding of fact.

Finding of Fact. We find the issues for the appellant, the Chicago Short Line Railway Company, that it was not guilty of negligence as alleged in the declaration herein of Donald A. Curran, appellee; that it did

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not permit one of the couplers on its car, as therein alleged, to be in a defective condition so that it would not couple automatically without a brakeman going between said car and the one next to it.

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE BARNES delivered the opinion of the court.

A rehearing is asked herein based on the contention that in a case where the cause of action arises on a Federal statute the practice that obtains in Appellate tribunals of this State of finding the facts and entering final judgment thereon (*Borg v. Chicago, R. I. & P. Ry. Co.*, 162 Ill. 348; *Donelson v. East St. Louis Ry. Co.*, 235 Ill. 625) violates the right to trial by jury guarantied by the seventh amendment of the Federal Constitution, and that we should conform to the practice of the Federal courts in that regard. Without discussing the point, we do not deem it well taken or that we should depart from a practice that has always obtained in this State. A rehearing will be denied.

James Cline, trading as J. & D. Cline, Appellee, v. Chicago, Milwaukee & St. Paul Railway Company, Appellant.

Gen. No. 21,189. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLINTON F. LEWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed with finding of fact. Opinion filed February 24, 1916.

Cline v. Chicago, Milwaukee & St. P. Ry. Co., 198 Ill. App. 163.

Statement of the Case.

Action by James Cline, trading as J. & D. Cline, plaintiff, against the Chicago, Milwaukee & St. Paul Railway Company, defendant, for damages done to plaintiff's automobile truck and goods therein, resulting from collision with defendant's locomotive at a public crossing. From a judgment for plaintiff, defendant appeals.

The negligence charged in the declaration was the running of the engine across the highway without ringing a bell or whistling at a distance of eighty rods from crossing, and without ringing bell or blowing whistle until it had reached such highway. The railroad tracks were double, one hundred feet wide, and ran north and south at right angles to the highway. Plaintiff was going east on the highway and engine was going north. Plaintiff and his chauffeur testified that though they looked they did not see the locomotive until they were on the westerly track when they jumped from the track permitting it to continue under power and collide with the engine. The evidence showed that at a distance of thirty to forty feet west of the easterly track there was an unobstructed view of the tracks for at least a quarter of a mile from the crossing. While defendant testified that bushes in the southwest corner of intersection of highway and tracks prevented him from seeing down the tracks until he was within ten feet thereof, other witnesses placed the distance at from thirty to forty-five feet. The chauffeur said he could have stopped the truck within ten feet.

As to the negligence charged in the declaration, three witnesses on each side testified directly on the subject. Those for plaintiff—himself, his chauffeur and Bleimehl's brother—said they heard no whistle or bell and none was sounded. The muffler of the automobile was open. One witness a block and a half west while doing his chores was attracted to the truck's passing by

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its "terrible noise." Another whom it passed within a half block of the tracks described its noise as unusual, "like an old threshing machine." He however heard the train and its whistle, though he could not see the train, while stopping for the truck to come up and pass him and was anticipating whether the truck would stop. The engineer testified that the fireman was continuously ringing the bell from eighty rods south where he blew the whistle and which he repeated within four hundred feet of the crossing. The fireman was not a witness, being at the time in the regular army in the east. But two other witnesses confirmed the engineer's testimony as to the whistling. One was on the tracks four hundred feet north of the crossing going south, the other within one half block of the tracks on the highway going east. Both of them also heard the gong at the crossing sounding, but could not say whether the bell was ringing or not.

O. W. DYNES, and C. S. JEFFERSON, for appellant;
H. H. FIELD, of counsel.

RICE, LOWES & O'NEIL, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 738*—*when driver of automobile truck attempting to cross tracks guilty of contributory negligence.* In an action for damages for injury to an automobile truck and goods as a result of a collision at a railroad crossing, where plaintiff could have seen defendant's truck when thirty feet away, and was driving the truck at such a speed that it could have been stopped at any time within ten feet, *held* that plaintiff was guilty of contributory negligence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. RAILROADS, § 738*—*when driver of automobile truck attempting to cross railroad track guilty of contributory negligence.* In an action for damages caused by collision of a railroad engine with an automobile truck, the law will not tolerate the absurdity of allowing plaintiff to testify that he looked but did not see the train, when the view was unobstructed and where if he had properly exercised his sight he must have seen it.

3. RAILROADS, § 729*—*when negative testimony as to ringing of bell insufficient to overcome positive testimony.* In a suit for damages caused by a locomotive colliding with an automobile truck at a highway crossing, and where plaintiff's automobile truck, according to testimony, made a "terrible noise," the situation of the occupants of the truck was less favorable for hearing, and their negative evidence is not entitled to more weight than positive evidence as to the fact that a whistle was blown by defendant's locomotive.

4. APPEAL AND ERROR, § 1802*—*when judgment reversed with finding of fact.* Where a verdict is against the weight of evidence on the question of negligence and contributory negligence, the judgment will be reversed with a finding of fact on such questions.

5. RAILROADS, § 735*—*when evidence insufficient to sustain finding that defendant guilty of negligence in failing to ring bell or blow whistle of locomotive.* In an action for damages for injury to an automobile truck and goods as a result of a collision at a railroad crossing, evidence held insufficient to sustain a finding that defendant was guilty of negligence in failing to blow the whistle and ring the bell of the locomotive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Frank Gibbs, Defendant in Error, v. Wallace C. Abbott
et al., Plaintiffs in Error.**

Gen. No. 21,203. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Writ dismissed. Opinion filed February 24, 1916.

Statement of the Case.

Bill filed by Frank Gibbs, complainant, against Wallace C. Abbott and others, defendants, to wind up and dissolve a corporation, The Abbott Press, under section 25, ch. 32, Rev. St. (J. & A. ¶ 2442). From an order directing that assets be turned into custody of the court, defendants sued out writ of error.

A receiver was appointed to take possession of its assets to whom the corporation, its officers, agents, etc., were directed to surrender them. The bill charged among other things that the O'Donnell Bromley Company, a corporation, was in possession of assets belonging to The Abbott Press, and had acquired such possession through fraudulent transfers without consideration, on which issue was taken by answer.

Later the receiver filed a report and petition reiterating the charge and alleging a demand on and failure by said O'Donnell Bromley Company and other defendants to turn over such assets, and asked that they be directed so to do, and in default thereof to show cause why they should not be punished for contempt.

The matter coming on to be heard on said petition and a joint answer thereto, and the sworn pleadings in the case as evidence, the court entered an order finding that The Abbott Press transferred all of its assets save its franchise to said O'Donnell Bromley

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Company through another defendant, Jeremiah J. O'Donnell, without any consideration, and also containing the following finding: "That it is for the best interest of all the parties to this suit that the said assets should be taken into the custody of this court during the pendency of this suit and preserved until the final determination of the issues herein;" and the order directed that respondents turn over to the receiver such assets so transferred as was in their possession or under their control.

This writ of error is sued out to review such order. A motion to dismiss the same on the ground that the order was not final and a writ will not therefore lie was without full consideration thereof reserved to the hearing.

FRANK & LURIE, for plaintiffs in error.

GALLAGHER & MESSNER, for defendant in error.

U. P. GALLAGHER, for Harry D. Knight, Receiver.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 315*—*when order in receivership proceedings not final order for which writ of error may be granted.* An order entered by chancellor in receivership proceedings, the language of which indicates the placing of property in *custodia legis* until the determination of the issues, including the right thereto, is not a final order for which writ of error may be granted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James F. Porter, Defendant in Error, v. Joe Cohn et al., trading as Cohn, Lieberman & Stiefel, Plaintiffs in Error.

Gen. No. 21,222. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 24, 1916. Rehearing denied March 6, 1916.

Statement of the Case.

Action for rent due by James F. Porter, plaintiff, against Joe Cohn, Leo Lieberman and Jerome Stiefel, trading as Cohn, Lieberman & Stiefel, defendants. From a judgment for plaintiff, defendants sue out a writ of error.

Porter was the assignee of a written lease of certain premises from one Pope to defendants, a copartnership. About three months after its execution the partnership was dissolved, and its business was sold to Cohn & Levin Cloak and Suit Company, which continued the same business in the same premises and paid the rent as it accrued to Pope until the assignment to Porter and then to the latter. The rent for the last two months of the term remained unpaid, for which judgment by confession was entered, but the case was reopened for trial before a jury. A verdict was directed and the judgment confirmed. It was urged that the judgment was contrary to the law and the evidence, the defense being that there was a surrender of the premises by the lessees and acceptance thereof by the lessor, and that the latter made a new lease on the same terms to the Cloak Company under which he and afterwards Porter collected rent as aforesaid. Negotiations for a new lease were attempted but never consummated. These facts were undis-

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puted: that when the Cloak Company took over plaintiffs in error's business one Miltenberg, a broker, at the request of attorneys for plaintiffs in error, asked one Wilson, the real estate agent of Pope, over the telephone whether the lease could be assigned to Cohn & Levin or whether a new lease would be given, and received the reply "to look them up and if they were all right to bring the matter before him;" that Wilson (the only party shown by the record to have been authorized to act for Pope) never had any other talk with reference to the matter nor negotiated any new lease; that Miltenberg who was shown to have acted, not as an agent for Pope but at the request of defendants, prepared a new lease to Cohn & Levin, and left it and a duplicate unsigned with Levin requesting him for references as to his financial standing; that no references were ever furnished, but that the rent was paid by the Cloak Company, as aforesaid, in sums and at times as provided for in the original lease. While Levin testified that he sent the new leases to Miltenberg and they were subsequently returned bearing the name of Pope and that he destroyed them, yet there was no attempt to show that the signature was Pope's or ever authorized by him, or that the document ever came to Levin from an agent of Pope.

CHARLES W. STIEFEL and JOHN B. HEINEMANN, for plaintiffs in error, Leo Lieberman and Jerome Stiefel.

GEORGE W. GORDON, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 325*—*when verdict for plaintiff for rent properly directed.* In an action for rent which was defended on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Bryson, 198 Ill. App. 171.

ground that there was a surrender of the premises by lessees and a new lease to a corporation which took over the business of defendants, and that lessor made a new lease of the premises, in the absence of legal proof of such new lease or surrender of the old one, verdict for plaintiff for rent was properly directed.

The People of the State of Illinois ex rel. Emma L. Parker, Plaintiff in Error, v. Mrs. William Bryson, Defendant in Error.

Gen. No. 21,232. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed February 24, 1916.

Statement of the Case.

Habeas corpus by Emma L. Parker, relator, to require respondent, Mrs. William Bryson, to produce relator's child in court to determine right of custody. From judgment remanding child to respondent, relator sues out writ of error.

While there was evidence of the mother's fitness to have the care and custody of the child, there was a stipulation only as to respondent's fitness, and recognizing as a fact the fitness of each, the trial court's order rested wholly on findings that the mother had abandoned the child on the date of its birth and that since that time it had been in the care and custody of respondent. Mrs. Parker lived in a country town in Fulton county, Illinois. She had been housekeeper for Dr. E. S. Parker of that town, the father of the child, and about July 1, 1912, had come to Chicago pursuant to arrangements made by him for her approaching

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accouchement. It was intended that her condition should be kept secret from their friends and especially from his aged, invalid mother who lived with him and to whom he had made the promise not to marry while she lived. In view of relator's condition, however, he married her secretly at Milwaukee, Wisconsin, July 24, 1912, and though his mother died the following month the marriage and subsequent birth of the child on November 12, 1912, at the Polyclinic Hospital, Chicago, did not apparently become public until after his death in May, 1914. They never lived together after the marriage. She appeared to have been left helpless and alone among strangers and amid circumstances with which she was unfamiliar and unable to cope. In such situation she made known to the matron of the hospital and Dr. Bacon in charge that on account of "conditions at home she could not reveal the marriage nor arrange to care for the baby," and wanted a good home for it if she could not keep it. Accordingly pursuant to arrangements (of which she was evidently not fully advised), the child was taken from her arms and the hospital on the day of its birth and delivered to the respondent, Mrs. Bryson. She did not know who had the child, and Dr. Bacon, alone, of all her acquaintances did know. She afterwards frequently asked him about it but got no definite or satisfactory answer. Thrown upon her own resources and counsel, and still feeling bound to shield her husband and conceal the situation, she remained in Chicago in respectable employment earning only about enough for her own support. After her husband's death the matter became public, and learning for the first time through the public press that Mrs. Bryson had her child she immediately demanded possession of it, the refusal to give which resulted in said proceedings.

A. J. Bates Co. v. Di Nunzio, 198 Ill. App. 173.

SHEPARD, McCORMICK, THOMASON, KIRKLAND & PATTERSON, for plaintiff in error; PERRY S. PATTERSON, of counsel.

BENJAMIN E. BURR, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

PARENT AND CHILD, § 3*—*when parent entitled to custody of child.* Where in habeas corpus proceedings for the custody of a child, it appears that the mother has not forfeited the right to her child by absolute relinquishment or some course of conduct or conditions that render its assertion incompatible with the parental claim and the child's best interests, she will be given the custody of such child as against the foster mother thereof.

A. J. Bates Company, Defendant in Error, v. Joseph Di Nunzio, Plaintiff in Error.

Gen. No. 21,233. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN STELK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed February 24, 1916.

Statement of the Case.

Action in replevin and trover by A. J. Bates Company, plaintiff, against Joseph Di Nunzio, defendant. From a judgment for plaintiff, defendant brings error.

CAIROLI GIGLIOTTI, for plaintiff in error.

M. M. JACOBS, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cohen v. Atchison, Topeka & Santa Fe Ry. Co., 198 Ill. App. 174.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 864*—*when court will not search record to find matters not appearing in abstract.* Where the abstract of record requires court to go through the record to find actual rulings of the court, controlling features of the evidence and instructions to the jury, the Appellate Court will not undertake such a search.

Louis Cohen, trading as Louis Cohen & Company, Appellee, v. Atchison, Topeka & Santa Fe Railway Company, Appellant.

Gen. No. 21,248.

1. CARRIERS,—*when liability as warehouseman for injury to goods fixed by bill of lading.* In assumpsit against a railroad company acting as warehouseman for oranges damaged by frost, where the shipment is interstate, and under the terms and conditions of a uniform bill of lading prepared in the form recommended by the Interstate Commerce Commission, the amount recoverable must be computed in accordance with the provisions of such bill of lading.

2. EVIDENCE, § 107*—*when telephone conversation admissible in evidence.* A telephone conversation with an unidentified person in the office of a railroad company is admissible in evidence.

Appeal from the County Court of Cook county; the Hon. FRANK G. PLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed February 24, 1916.

ROBERT DUNLAP, LEE F. ENGLISH, JAMES L. COLEMAN and HOMER W. DAVIS, for appellant.

CHARLES A. BUTLER, for appellee; FRANKLIN RABER, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cohen v. Atchison, Topeka & Santa Fe Ry. Co., 198 Ill. App. 174.

MR. JUSTICE BARNES delivered the opinion of the court.

This appeal is from a judgment for \$305 in favor of Cohen, plaintiff, against the Railway Company in an action of assumpsit for damages to oranges while in the custody of the latter as a warehouseman.

The oranges were transported from Prenda, California to Chicago, Illinois, in interstate commerce over the company's road, and after arrival in Chicago the car was placed on the team or unloading track for delivery, and the consignee was duly notified thereof. The consignee inspected and found the goods in good condition after their arrival. The claim is that through negligence of the company they were afterwards damaged by frost before being unloaded.

The case was tried on the theory, and at plaintiff's request the jury were instructed, that the measure of damages was "the difference between the fair and reasonable cash market value of said oranges in good merchantable condition in Chicago, Illinois, on the day they were delivered by the defendant to said plaintiff and their fair and reasonable cash market value in Chicago, Illinois, at the time and in the condition in which they were delivered to said plaintiff."

This was error. It was an interstate shipment. Defendant's tariffs and schedules were duly established under the Federal acts regulating commerce, and the goods were received for transportation under the terms and conditions of a uniform bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission. The terms and conditions of the bill of lading, so far as necessary to be considered, are precisely the same as those quoted in the opinion of Mr. Justice Pitney of the Supreme Court of the United States, handed down January 10, 1916, since this appeal was taken, in the case of *Cleveland, C., C. & St. L. Ry. Co. v. Dettlebach*, 239 U. S. 588,

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and it was there held that the question was Federal in its nature.

Passing upon the question of the carrier's responsibility under the provisions of that bill of lading and the so-called Hepburn Act, amending the Commerce Act (34 Stat. 584, ch. 3591), the court held that the phrase in the bill of lading "any loss or damages for which any carrier is liable" includes the "carrier's responsibility as warehouseman," and that the "reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods."

In that case the valuation was declared; here it was not. But section 3 of the bill of lading provides that "any loss or damages for which the carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the time and place of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation."

It follows, therefore, from the opinion above cited that if the Railway Company is liable for damages resulting from its capacity as warehouseman, they must be computed in accordance with the contract provisions quoted. No proof conforming thereto was presented, but the proof adduced as to the amount of damages suffered was in accordance with the theory of said instruction. Under that state of the record the court should have granted defendant's motion for a new trial. As the judgment must for reasons stated be reversed and the cause remanded, it is unnecessary to discuss other questions argued which may not arise in another trial. We will, however, add that as the tele-

Cross v. City of Chicago, 198 Ill. App. 177.

phone conversation with an unidentified person in the company's office may again be offered, it is admissible under the ruling in *Godair v. Ham Nat. Bank*, 225 Ill. 572.

Reversed and remanded.

**Nellie A. Cross, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 20,638. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed March 2, 1916.

Statement of the Case.

Action by Nellie A. Cross, plaintiff, against the City of Chicago, defendant, on account of personal injuries sustained by her. From a judgment of the Municipal Court of Chicago dismissing her statement of claim because of failure to allege the giving of statutory notice, plaintiff brings error.

On the second day of the present term the Appellate Court affirmed the judgment of the Municipal Court, but the attention of the court having since been called to the decision in *Enberg v. City of Chicago*, 271 Ill. 404, the former opinion is withdrawn and the judgment reversed and remanded.

EDWARD H. STEARNS, for plaintiff in error.

N. L. PIOTROWSKI, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Fred Miller Brew. Co. v. G. Heileman Brew. Co., 198 Ill. App. 178.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1802***—*when Appellate Court will reverse and remand case because of subsequent decision of Supreme Court on similar point.* Where Supreme Court holds point of law contrary to holding of Appellate Court in different case but in same term of court, the Appellate Court will reverse and remand such case which it had previously affirmed.

2. **MUNICIPAL COURT OF CHICAGO, § 13***—*when statement of claim in action against city for personal injuries sufficient.* In fourth-class cases in the Municipal Court of Chicago, a statement of claim in an action against a city for personal injuries need not allege the giving of statutory notice of injuries to the city.

Fred Miller Brewing Company, Appellee, v. G. Heileman Brewing Company, Appellant.

Gen. No. 21,835. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916.

Statement of the Case.

Action by Fred Miller Brewing Company, plaintiff, against G. Heileman Brewing Company, defendant, for the purchase price of saloon fixtures. From a judgment for \$1,500 for plaintiff, defendant appeals.

Plaintiff was lessee of premises at No. 2109 Wabash avenue and the owner of saloon and restaurant fixtures therein. In March, 1912, representatives of plaintiff had a conversation with Walter G. Mueller, who was manager of the Chicago branch of the defendant company, whose main office was in Wisconsin, at which time the saloon business was not conducted in these premises because the saloon license had been

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fred Miller Brew. Co. v. G. Heileman Brew. Co., 198 Ill. App. 178.

revoked. During this conversation it was agreed between these representatives of the respective breweries that the defendant would purchase from the plaintiff the fixtures and furniture contained in the premises and also the lease, which would be assigned to the defendant, but that the \$1,500 purchase price would not be paid until Mr. Mueller was sure the license would be restored. The lease was dated January 20, 1912, and ran to the plaintiff as lessee, and at this time, by apt words in writing, the lease was assigned from plaintiff to defendant, the defendant signing "G. Heileman Brewing Company (Seal), by Walter G. Mueller." The landlord consented to this assignment. At the same time, by another writing signed by the respective parties in the same manner, it was agreed that the furniture in the saloon should be sold by the plaintiff to the defendant, the defendant agreeing to pay therefor the sum of \$1,500 as soon as a saloon license should issue from the City of Chicago for the operation of a saloon on said premises. Later on this license was issued, and on June 13, 1912, the saloon business was resumed.

Defendant entered into possession of the premises and furniture, and paid rent under the lease from and including June, 1912, until the expiration of the lease on April 30, 1913. It used the furniture in question during all of this time, and never offered to return the same or to reassign the lease. After the license was issued request was made of defendant to pay the \$1,500, which was refused by the defendant.

WILKERSON, CASSELS & POTTER, for appellant; EDWIN H. CASSELS and KENNETH B. HAWKINS, of counsel.

WINSTON, PAYNE, STRAWN & SHAW, for appellee; ARTHUR C. MARRIOTT, of counsel.

Becker v. Hollesen, 198 Ill. App. 180.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

CORPORATIONS, § 384*—*when taking of assignment of lease deemed ratified.* Although the representative of a brewing company may not have had authority to take assignment of lease of saloon premises and to purchase the fixtures therein, in the first instance, the company must be held to have ratified the agreement where it had knowledge thereof, and, while protesting as to the price, nevertheless continued to hold possession of the fixtures and leased premises and never offered to return the furniture to the lessee.

Walter J. Becker, Appellee, v. Sievert Hollesen, Appellant.

Gen. No. 21,875. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed March 7, 1916. Rehearing denied March 20, 1916.

Statement of the Case.

Action by Walter J. Becker, plaintiff, against Sievert Hollesen, defendant, for commission of \$1,375 for procuring purchasers for defendant's real estate. From a judgment in favor of plaintiff for the amount claimed, defendant appeals.

Plaintiff alleged that in January, 1913, defendant promised to pay him two and one-half per cent. commission if plaintiff would procure purchasers for certain real estate belonging to defendant, at a price of \$55,000; that about April 14, 1913, plaintiff did so, but defendant refused to abide by his promise.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The evidence tended to show that in April, 1913, defendant owned a tract of land situated in Evanston, Illinois, north of Devon avenue and east of Clark street, which was designated as "the ball park," and another piece of land near by, which was called "the Schreiber avenue strip." The ball park was used as such, with grand stand, ticket offices and appurtenances, under a lease for a term of eight years beginning April 1, 1909. A portion of the Schreiber avenue strip was also under lease for a term of three years beginning October 1, 1911, with privilege to the lessee of renewal for an additional period of three years. In the latter part of 1912, or perhaps in January, 1913, plaintiff, a real estate broker, asked defendant what price was wanted for the ball park and defendant gave him a price of \$45,000. Afterwards, in April, 1913, plaintiff told defendant that he thought he had a purchaser for the ball park provided the Schreiber avenue strip could also be purchased, and upon inquiring as to the price of that was told that it could be bought for \$10,000. Later on the plaintiff and defendant met Henry C. Bartling and Selma Sundsten, prospective purchasers procured by plaintiff, and a written option agreement was drawn up and \$1,000 deposited to be held in escrow pending the exercise of the option. This option gave the prospective purchasers the privilege of purchasing on or before October 15, 1913, both the ball park and the Schreiber avenue strip at a price of \$55,000, and provided that the option contract should be void if the "leases on the above premises are not removed," and that in this event the escrow money should be returned to the prospective purchasers. After the execution of this agreement attempts were made in divers ways to cancel the lease on the ball park, but without success. By June 25, 1913, all the parties apparently being of the opinion that there was no prospect of canceling or forfeiting the lease, it was

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agreed by them that the option agreement should be canceled and the money refunded, and this was accordingly done.

Defendant continued in his efforts to secure the cancellation of the lease on the ball park, and in August terms were agreed on between him and the ball club which involved a remittance to the club of \$1,000 of rent in consideration of which the lease was canceled by mutual agreement. During the following month plaintiff went to defendant and said he had heard that the lease had been canceled, was informed that this was true, and plaintiff said that he would see his parties again. Afterwards he reported to defendant that his parties wanted time to get estimates on paving, sewers and other improvements, as it was contemplated to subdivide the ball park. Defendant then stated that he would not sell the Schreiber avenue strip at all. Some weeks later plaintiff, with Bartling and Sundsten, called upon defendant and was told by him that he would not sell the Schreiber avenue strip, and that his price on the ball park was \$50,000. This the parties refused to pay, and no further negotiations between them were had. Plaintiff claims two and one-half per cent. commission on \$55,000, the price originally given him by defendant for all of the said real estate.

J. F. CRAHEN, for appellant.

GUY VAN SCHAICK, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 36*—*when owner of real estate not liable for commissions to agent procuring prospective customer. As between a real estate broker and an owner of property for whom such real*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Warner v. Pacific Coast Cas. Co. of San Francisco, 198 Ill. App. 183.

estate broker procured customers, the owner of the property was not liable for commissions where the owner verbally put a certain price on land and at such time the broker brought customers to the owner who signed an option agreement which was canceled and where about nine months later the owner raised the price of such land after it had cost the owner a considerable sum to secure cancellation of a lease on the premises, and where there may have been other reasons for raising the price, even though the broker procured the same prospective purchasers as previously, who were willing to pay the sum first asked.

2. **VENDOR AND PURCHASER, § 85***—*what constitutes cancellation of option contract for purchase of land.* A cancellation of an option contract for the purchase of land by parties thereto, held to be a cancellation in fact and in law.

3. **BROKERS, § 41***—*when owner not bound by statement to broker as to price of real estate.* An owner of real estate is not bound for an indefinite period by his verbal reply to an inquiry as to the price of such real estate made to a broker who agrees to furnish a prospective purchaser.

4. **BROKERS, § 36***—*when owner of real estate not liable to broker for commissions for procuring prospective customer.* Where real estate broker procured prospective customers who were not willing to buy property under existing conditions but who would buy same if freed from a lease thereon, such broker is not entitled to a commission.

Hiram S. Warner, Appellee, v. Pacific Coast Casualty Company of San Francisco, Appellant.

Gen. No. 21,914. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed March 7, 1916. Rehearing denied March 20, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Hiram S. Warner, plaintiff, against Pacific Coast Casualty Company of San Francisco,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant, for damages for breach of a contract of insurance agency and for commission. From a judgment for plaintiff, defendant appeals.

The contract sued on, dated February 1, 1906, provided that plaintiff should have the exclusive right in the state of Illinois to burglary, plate glass and employers' liability insurance business, his compensation to be forty per cent. of premiums on all policies issued within said territory, and a further commission of ten per cent. upon the net profits; instructions in writing to the plaintiff from the home office (in San Francisco) by the defendant to be construed to be part of the contract; contract terminable on thirty days' written notice by either party. It was claimed that the original compensation of forty per cent. was reduced by agreement to thirty per cent. On April 23, 1907, defendant wrote plaintiff that it did not care for any extended line of this kind of business, that the business would not stand a higher commission rate than thirty per cent. and it would accept such insurance on that basis only, and that if the business could not be written on this basis as general agent commission to not write it. This appeared to have been agreed to by plaintiff, as shown both by his reply letter dated May 6, 1907, and his subsequent conduct in deducting only thirty per cent. of premiums in making remittances.

The second part of plaintiff's claim was for forty per cent. commission on liability insurance written by the firm of Burras & Goodbody in the years 1910 and 1911. Defendant claims that in the latter part of 1910 it was agreed by it and plaintiff that the business in Illinois was to be divided so that the firm of Burras & Goodbody should be the general agent for the employers' liability insurance instead of plaintiff, who was to continue as agent in lines of plate glass and burglary insurance only. Plaintiff and Burras & Goodbody interchanged business, that is, plaintiff

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brought all liability insurance business coming to him to Burras & Goodbody, who paid plaintiff all the commission thereon, while this firm gave plaintiff its burglary and plate glass insurance business and received the commission.

A letter from defendant dated November 14, 1910, was apparently a threat to sever all relations with plaintiff unless he observed strictly the agreement to divide the business as had been arranged, and in plaintiff's reply of November 21st he seemed to resent any suggestion that he had not strictly observed this agreement. Defendant apparently accepted his statement of the fact and did not at that time terminate his plate glass and burglary insurance agency. This was subsequently done, in January, 1912.

The third part of plaintiff's claim was for commissions on certain insurance written by agencies amounting to \$3,818.47, against which defendant claimed certain amounts which appear to be credits given to defendant by plaintiff in the copy of account attached to his declaration.

THURMAN, HUME & KENNEDY, for appellant.

DANIEL S. WENTWORTH, GEORGE W. PLUMMER and DAVID B. MALONEY, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 252***—*when evidence sufficient to establish modification of contract of agency.* As between a casualty insurance company and its agent, a contract for a certain commission held to have been later changed to a lower basis by a letter from the company to its agent and his reply thereto, and the subsequent conduct of such agent in deducting only such lower commission from remittances to the company.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Warner v. Pacific Coast Cas. Co. of San Francisco, 198 Ill. App. 183.

2. CONTRACTS, § 86*—*what constitutes sufficient consideration for contract for commissions.* The acceptance of liability insurance by an agent after notice from his principal, a casualty insurance company, that the company would not accept same except on a certain lower commission basis, is sufficient consideration for the contract for such lower commission.

3. CONTRACTS, § 251*—*when instrument under seal may be modified by executed parol agreement.* A parol agreement to reduce commissions of a liability insurance agent is valid and binding, when executed, so as to modify an instrument under seal.

4. CONTRACTS, § 252*—*when evidence sufficient to establish modification of contract of agency.* An agreement between a casualty insurance company and its prior exclusive agent, held modified so as to divide insurance business between such agent and another agent, where it appeared that a letter was sent by the company threatening to discontinue the agency of such prior agent, and the prior agent and subsequent agent exchanged business on the basis of such division.

5. CONTRACTS, § 86*—*what constitutes sufficient consideration for modification of contract of agency.* Where a casualty insurance company threatened to discontinue agency and insisted that its previously exclusive agent divide business with another agent, the continuance of the agency of the prior agent was sufficient consideration for the modification of the contract of agency as insisted upon by the company.

6. PLEADING, § 42*—*what does not constitute part of declaration.* A copy of an account which is attached to a declaration does not constitute a part of the declaration.

7. APPEAL AND ERROR, § 743*—*when copy of account attached to declaration not part of record.* A copy of an account which is attached to a declaration must be introduced in evidence, like any other writing, to become a part of the record, as it does not constitute a part of the declaration.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Von Der Brelle v. Von Der Brelle, 198 Ill. App. 187.

Mary Von Der Brelle, Appellant, v. Henry Von Der Brelle, Appellee.

Gen. No. 21,949. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916.

Statement of the Case.

Bill for maintenance and support and other relief by Mary Von Der Brelle, plaintiff, against her husband, Henry Von Der Brelle, defendant. From a decree dismissing her bill of complaint and the amendments thereto, complainant appeals.

It was alleged that the husband had refused to convey certain real estate to his wife and to cancel a certain lease to his son-in-law. Under advice of a physician he left his wife for a period of rest, which was said to have been necessitated by the conduct of his wife.

COBURN & BENTLEY, for appellant.

ATWOOD, PEASE & LOUCKS, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 217*—*when wife not justified in refusing to live with husband so as to be entitled to separate maintenance.* Refusal of husband to convey some of his property to his wife or to cancel a certain lease to his son-in-law does not give her legal grounds for refusing to live with him, under Hurd's Rev. St., ch. 68, sec. 22 (J. & A. ¶ 6159), so as to entitle her to separate maintenance.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Chicago Railways Co., 198 Ill. App. 188.

2. HUSBAND AND WIFE, § 222*—*when husband not guilty of desertion of wife so as to entitle her to separate maintenance.* Desertion of a wife by her husband, so as to entitle her to separate maintenance under Hurd's Rev. St. ch. 68, sec. 22 (J. & A. ¶ 6159), does not take place when husband, under the advice of a physician, leaves her for a period of rest, and he is impelled thereto by the conduct of the wife.

Richard Devine by Mamie Lenihan, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 21,982. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN H. FORNOFF, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916.

Statement of the Case.

Action on the case by Richard Devine, a minor, by Mamie Lenihan, his next friend, plaintiff; against Chicago Railways Company, defendant, for injuries sustained when he was struck by defendant's car. From a verdict and judgment for \$12,500 in favor of plaintiff, defendant appeals.

Plaintiff, aged seven years and seven months old, attended a school in Chicago located at the corner of Wells and Wendell streets. On December 26th, at about 11:30 o'clock in the morning he was dismissed from school and started to cross Wells street when he was struck by one of defendant's cars. Plaintiff alleged in his declaration the existence of an ordinance of Chicago which declared it unlawful to run a street car at a greater speed than five miles per hour while within 250 feet of a schoolhouse, between the hours of 11 a. m. and 1:45 p. m., of any day when school was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devine v. Chicago Railways Co., 198 Ill. App. 188.

in session and that defendant in violating such ordinance caused the accident to plaintiff.

WEYMOUTH KIRKLAND and CHARLES LE ROY BROWN,
for appellant; JOHN R. GUILLIAMS, of counsel.

ELMER & COHEN, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 78*—*when violation of speed ordinance not negligence per se.* The violation of an ordinance as to speed of a street car within a certain distance of a school building during a certain period of the day, resulting in injury to a child, is simply prima facie evidence of negligence from which the jury may infer negligence, and which may be rebutted by other evidence, and does not constitute negligence *per se*.

2. STREET RAILROADS, § 142*—*when instruction as to liability for negligence in operation of car in violation of ordinance erroneous.* In an action against a street railroad for injuries to a child which was attempting to cross the street, an instruction that if defendant violated the ordinance as to speed of street cars within a certain distance of school buildings during a specified period of the day and plaintiff was exercising due care defendant was liable, *held erroneous*.

3. DAMAGES, § 213*—*when instruction as to damages recoverable by child not erroneous.* In an action for damages for personal injuries to a child who was run over by a street car, an instruction limiting the amount of damages for loss of future earning capacity to the time after plaintiff shall have reached his majority, *held correct*.

4. STREET RAILROADS, § 147*—*when instruction referring to amount of damages alleged in declaration not misleading.* In an action for damages for personal injuries to a child which was run over by a street car, an instruction referring to the amount of damages claimed and alleged in the declaration *held not misleading*.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Speer Hardware Co. v. Consolidated Adjust. Co., 198 Ill. App. 190.

Speer Hardware Company, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 21,997. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. DENNIS W. SULLIVAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916.

Statement of the Case.

Action by Speer Hardware Company, plaintiff, against Consolidated Adjustment Company, defendant, upon a guaranty in a contract whereby defendant undertook to collect certain accounts for plaintiff. From a judgment for plaintiff, defendant appeals.

The contract sued on was similar to that in *Barstow Stove Co. v. Consolidated Adjustment Co.*, 175 Ill. App. 449.

DEHAVAN B. COLE, for appellant; ADELOR J. PETIT, of counsel.

HENRY & ROBINSON, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

ESTOPPEL, § 89*—*when agent estopped to deny failure of principal to furnish proper accounts for collection.* A collection agency which selects the accounts upon which it undertakes to guaranty collection cannot be heard to say in a suit against it based on such guaranty that plaintiff is in default as to the kind of accounts to be furnished by it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Galveston S. & H. Co. v. Consolidated Adjust. Co., 198 Ill. App. 191.

Galveston Shoe & Hat Company, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 21,999. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916. Rehearing denied March 20, 1916.

Statement of the Case.

Action by Galveston Shoe & Hat Company, plaintiff, against Consolidated Adjustment Company, defendant, on guaranty by defendant to collect certain accounts. From a judgment by default for plaintiff, defendant appeals.

The contract sued on was similar to that in *Barstow Stove Co. v. Consolidated Adjustment Co.*, 175 Ill. App. 449, and noted in *Speer Hardware Co. v. Consolidated Adjustment Co.*, ante, p. 190.

DELAVAN B. COLE, for appellant; ADELOR J. PETIT, of counsel.

DANIEL S. WENTWORTH, DAVID B. MALONEY and JOHN P. REED, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. ESTOPPEL, § 89*—*when agent estopped to question character of accounts furnished by principal for collection.* A collection agency having guarantied in a contract the collection of certain accounts, a provision in that contract, whereby the agency reserves the right to cancel the contract and surrender all claims listed thereunder

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Texas Company v. Consolidated Adjustment Co., 198 Ill. App. 192.

at any time within six months from date, estops the agency from questioning the character of such accounts after the elapse of such six months.

2. **CONTRACTS, § 390***—*when question whether reasonable time has elapsed after expiration of contract within which to collect accounts for jury.* In an action against a collection agency for breach of a guaranty to collect a certain number of accounts, whether a reasonable time has elapsed after the expiration of the contract within which to collect what they had guaranteed is one of fact to be ascertained by the consideration of evidence.

3. **MUNICIPAL COURT OF CHICAGO, § 13***—*when order of court refusing to strike affidavit of defense from files not reversed.* An order of the Municipal Court of Chicago in refusing to strike an affidavit of defense from the files on the ground that it was not filed in time will not be reversed where such course is not necessary to prevent a failure of justice.

Texas Company, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 22,000. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916. Rehearing denied March 20, 1916.

Statement of the Case.

This case is in every respect substantially like *Galveston Shoe & Hat Co. v. Consolidated Adjustment Co.*, No. 21,999, *ante*, p. 191, and what was said in that opinion applicable herein is reaffirmed. For the reason indicated in that opinion, the judgment in this case is reversed and the cause remanded.

DELAVAN B. COLE, for appellant; ADELOR J. PETTIT, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

C. L. Gray Lumber Co. v. Otto Scharmer, 198 Ill. App. 193.

DANIEL S. WENTWORTH, DAVID B. MALONEY and JOHN P. REED, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

C. L. Gray Lumber Company, Appellee, v. Otto Scharmer, trading as Scharmer Construction Company, Appellant.

Gen. No. 22,016. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916.

Statement of the Case.

Action by C. L. Gray Lumber Company, plaintiff, against Otto Scharmer, trading as the Scharmer Construction Company, defendant, for refusal by defendant to take lumber, according to an agreement, to be furnished by plaintiff. From a judgment in plaintiff's favor, defendant appeals.

There were several letters between the parties leading up to the final order of March 27, 1913, which was sued on and is as follows:

“March 27th, 1913.

“C. L. GRAY LUMBER Co.,

“MERIDIAN, MISS.

“GENTLEMEN:—

We herewith place an order with you for 300,000 Ft. 3x6 at \$21.50 per M. F. O. B. Cars Chicago, to be 12-14-16 feet long. This is for prospective work and we do not know the exact lengths in quantities we will

C. L. Gray Lumber Co. v. Otto Scharmer, 198 Ill. App. 193.

need. This is to be held subject for call within six months.

“OTTO SCHARMER.

“Agreed

“(Signed) C. L. GRAY LUMBER Co., per
“C. L. GRAY.

“Note: Any slight difference in the amount of quantity used more or less to be adjusted at the above price.”

The court refused to admit the evidence of Scharmer's bookkeeper, Miss Crane, as to a conversation between Scharmer and Gray. The alleged conversation was said to have taken place some two months after the contract was made. According to Scharmer, he only expressed doubt as to his ability to order lumber, as he was short of work.

GUSTAV E. BEERLY, for appellant.

ARCHIBALD CATTELL, for appellee; CARL A. WALDROM, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 16*—*when order for goods definite in terms.* A letter from defendant to plaintiff ordering lumber in the light of previous letters of the parties and the testimony of witnesses, held to be definite enough to disclose a cause of action, in particulars of quantity, price, time of delivery and character of materials.

2. CONTRACTS, § 198*—*when meaning of trade terms may be explained by experts.* The meaning of trade terms used in letters or contracts may always be explained by persons experienced in the particular business.

3. CONTRACTS, § 377*—*when evidence inadmissible to aid in construction of contract.* Where testimony of a third person as to a conversation between plaintiff and defendant subsequent to the making of the contract sued on would corroborate defendant's testimony but would not modify, change or aid construction of such contract, it was not error to refuse admission of such testimony.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**The People of the State of Illinois ex rel. City Council
of the City of Chicago, Appellant, v. Board of
Education of the City of Chicago, Appellee.**

Gen. No. 22,226.

1. MUNICIPAL CORPORATIONS, § 45*—*when city council power to examine records of board of education as to expenditures.* Under Hurd's Rev. St., ch. 122 (J. & A. ¶ 10022 *et seq.*) and the special charter of 1863 of the City of Chicago, the duty of control of expenditures of the board of education by the city council necessarily involves knowledge of receipts and expenditures and the right to obtain this knowledge through examination of records of the board of education.

2. MUNICIPAL CORPORATIONS, § 45*—*when city council entitled to access to records of board of education as to expenditures.* The duty of the Chicago Board of Education to communicate to the city council such information as may be required does not deprive such council of the right of access to the original sources of information from records of such board.

3. MUNICIPAL CORPORATIONS, § 45*—*when city council may examine records of board of education as to expenditures.* While Act of 1909, Hurd's Rev. St. ch. 122 (J. & A. ¶ 10022 *et seq.*), to establish and maintain a system of free schools, gives the Board of Education of the City of Chicago exclusive right of management of many details of the schools, it has not taken from the city council the right, under the special charter conferred in 1863, to examine the original records of receipts and expenditures of such board.

4. MUNICIPAL CORPORATIONS, § 45*—*when city council may examine records of board of education as to expenditures.* The animus or motive of the Chicago City Council in seeking to make an examination of the records of receipts and expenditures of the board of education of such city cannot affect its right to so do.

Appeal from the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed March 7, 1916.

DONALD R. RICHBERG, for appellant.

ANGUS ROY SHANNON, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Board of Education, 198 Ill. App. 195.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Upon relation of the City Council of the City of Chicago a petition for mandamus was filed, praying that the Board of Education of Chicago be commanded to give to the city council full and complete access to all books, records, documents and information concerning the receipt and expenditure of moneys in possession of the board. To this a general demurrer was filed and subsequently sustained, and the petition ordered dismissed. Petitioners elected to stand by their petition, and by this appeal seek the reversal of the order of the court.

Is the city council empowered by law to examine the records of receipts and expenditures of the money of the board of education? We hold that it is.

Under the special charter of Chicago, year 1863, the council was given power (quoting from *People v. Healy*, 231 Ill. 629, 635) "to manage the school funds, school houses and school matters generally, and the board of education only had control subject to the regulations prescribed by the common council." Under section 2, chapter 9, of the special charter, the council was given power to levy and collect a school tax, and under the Constitution adopted in 1870, the council was given power to appropriate moneys for school purposes. In 1872 the Legislature passed an act entitled: "An Act to establish and maintain a system of free schools," approved April 1, 1872. In 1875 the City of Chicago became incorporated under the general law for the incorporation of cities and villages, and it was held in *Brenan v. People*, 176 Ill. 620, that the special charter thereby became no longer in force, except so much of it as was not inconsistent with the general law. The Cities and Villages Act contains no provision relating to schools; hence the provisions of the special charter relating to schools were not abrogated, and the division

of powers between the city council and the board of education was to be determined under the provisions of the special charter and of the School Act of 1872. In *People ex rel. Neal v. Roche*, 124 Ill. 9, the Supreme Court stated this division of powers as follows:

“It seems clear, from all the legislation on the subject, it was the intention of the legislature the city, in cities having over one hundred thousand inhabitants, should have the title to all real estate held for school purposes, and the city treasurer should have the custody of all school funds, no matter from what source derived. The board of education in such cities is given no independent powers as to the real estate held or to be purchased for school purposes. Whatever the board can do in reference to buying or leasing sites for school houses, or issuing bonds for the erection of buildings thereon, can only be done ‘with the concurrence of the city council.’ The powers and duties, the board may exercise, independently of the city council, relate mostly to furnishing school houses, the employing of teachers, and the management of schools generally. But all school property and funds are placed in and under the care of the city council or some city officer.”

This division of powers was not changed by the passage of the School Act of 1889. *Brenan v. People*, 176 Ill. 620.

In 1909 the Legislature passed an act entitled: “An Act to establish and maintain a system of free schools,” approved and in force June 12, 1909, Hurd’s Ill. St., ch. 122 (J. & A. ¶ 10022 *et seq.*), which is the statute now in force. This act did not substantially change the respective powers of the city council and of the board of education from the status fixed by the prior statutes. Sections 128 to 150 (J. & A. ¶¶ 10163-10185), inclusive, of the present statute provide for the organization and regulation of the “boards of education in cities of 100,000,” and these provisions apply to the Board of Education of Chicago. Under the

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present statute the board is given exclusive control of the management of the schools with reference to providing furniture for school buildings, hiring rooms for use of the board or schools, employing teachers and fixing compensation, prescribing school books, establishing rules for government, and other similar details stated in some twenty-four paragraphs in section 132 (J. & A. ¶ 10167) of the statute. With the concurrence of the city council the board has power (1) to erect or purchase buildings for school houses and to keep them in repair; (2) to buy or lease school houses with grounds, or condemn land for the same "in the name of the city in trust for the use of schools"; (3) to borrow money upon the credit of the city. The statute also provides that the city shall take title to all real estate, and no sale shall be made except by the city council upon written request of the board; that all moneys raised by taxation "shall be held by the city treasurer as a special fund for school purposes, subject to the order of the board of education, upon warrants to be countersigned by the mayor and the city comptroller or, if there be no city comptroller, by the city clerk." The statute in terms specifically negatives any implication that the board has authority to levy or collect taxes, this power remaining in the city council under the special charter. It is made the duty of the board to report to the city council, from time to time, any suggestions they may deem expedient or requisite in relation to the schools and the school fund, or the management thereof, and generally to recommend the establishment of new schools and districts; to prepare and publish an annual report, which shall include the receipts and expenditures of each school, specifying the source of such receipts and the object of such expenditures; "to communicate to the city council, from time to time, such information as may be required." It is also provided that "no power

given to the board of education shall be exercised by the city council of such cities.”

Upon the city council is laid not only the duty of furnishing funds for school purposes, but also the duty of control of expenditures in a large measure. It is self-evident that such a duty cannot be performed with intelligence and judgment unless the council is fully and accurately informed as to the requirements for school purposes. This necessarily involves knowledge of the receipts and expenditures, and the right to obtain this knowledge through examination of the records of the board inheres in the mutual relations of the parties and must be upheld unless the statute has clearly closed this avenue of information.

Does the statute, in terms or by implication, forbid the city council to obtain the needed information by first-hand examination of the records? There is nothing in the general scheme of the statutory provisions to indicate that this is so. Rather the requirement of concurrence by the council in financial matters indicates to the contrary. Neither do we think the duty of the board to communicate to the city council such information as may be required negatives the right of the council to examine the basis of the communication. The obligation to convey information to the council, when requested, is a rule of convenience and necessity in the transaction of their concurrent business. It serves a reasonable and proper purpose, but it would require a strained construction to give this rule of convenience the force of an inhibition of the inherent right of the council to have access to the original sources of information.

Our conclusion is that under its special charter the city council has complete control of the schools except as specifically modified by the statute; that the statute, while giving to the board exclusive right of management of many details of the schools, has not taken from the council the right to examine its records of receipts

McCausland v. Chicago City Railway Co., 198 Ill. App. 200.

and expenditures; that the animus or motive of the council in seeking to make such examination cannot affect its right (*Murphy v. Chicago, R. I. & P. Ry. Co.*, 247 Ill. 614); that the council is not required to consider a communication from the board as its sole and ultimate source of information. It is not important whether the field of the council's financial action be small or large; whatever it is, the intelligent exercise of the council's powers will be promoted by knowledge even of those details over which it has no direct control.

We hold that it was error to sustain the demurrer, and the order dismissing the petition is reversed and the cause remanded with directions to overrule the demurrer and for further proceedings not inconsistent with what is herein expressed.

Reversed and remanded with directions.

Mary McCausland, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,890. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of fact. Opinion filed March 7, 1916. Rehearing denied March 20, 1916.

Statement of the Case.

Action by Mary McCausland, plaintiff, against Chicago City Railway Company, defendant, for damages for personal injuries. From a verdict and judgment for plaintiff, defendant appeals.

Defendant while rehabilitating its street car tracks in Chicago laid a temporary north and south track on

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Halsted street at the intersection of Thirty-sixth street. When plaintiff was about to board defendant's southbound car at that point, she alleged, the car swayed and struck, causing the injury sued on. The rail nearest plaintiff (the west rail) was about three-quarters of an inch higher than the other rail (east rail) of the southbound track. Defendant's men were detailed to watch the temporary track to keep it surfaced, lined and gauged. The west rail (nearest plaintiff) was four feet from the curbstone. The overhang of defendant's cars was twenty-two to twenty-four inches on each side. Plaintiff testified that she stood one foot from the curb while waiting for the car, and was so standing when the car struck her.

FRANKLIN B. HUSSEY and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

THOMAS E. ROONEY and FERDINAND GOSS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 421*—*when intending passenger struck by street car guilty of contributory negligence.* An intending passenger who stands so close to a moving street car on which he intends to take passage as to be struck is guilty of contributory negligence.

2. APPEAL AND ERROR, § 1802*—*when case reversed with finding of fact.* When it is patent from the evidence that plaintiff cannot maintain the action, the Appellate Court should reverse with a finding of fact.

3. NEGLIGENCE, § 90*—*when contributory negligence bars recovery.* There can be no recovery when the accident, on account of which suit is brought, could not have happened but for plaintiff's contributory negligence, even though defendant was guilty of negligence which may have contributed in some way to bring about the accident.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cermak v. Guggenheim Laundry Mach. Co. et al., 198 Ill. App. 202.

Anton J. Cermak for use of C. J. McCarty, Appellee, v. Guggenheim Laundry Machinery Company and Charles T. Luckow, Appellants.

Gen. No. 21,923. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916.

Statement of the Case.

Action on replevin bond by Anton J. Cermak, for the use of C. J. McCarty, plaintiff, against the Guggenheim Laundry Machinery Company and Charles T. Luckow, defendants. From a judgment for the penalty of the bond and for damages for plaintiff, defendants appeal.

SABATH, STAFFORD & SABATH, for appellants.

E. S. HARTMAN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 161*—*when judgment conclusive as to ownership of goods.* As between the parties to an action on a replevin bond, the question of ownership of the goods is *res adjudicata* settled by the proceedings in the replevin suit.

2. REPLEVIN, § 165*—*when suing out of writ of retorno habendo not condition precedent to maintenance of action on bond.* It is not incumbent on plaintiff in suit in replevin bond to sue out a writ of *retorno habendo* as a condition precedent to such suit, the goods should have been returned in accordance with the judgment in the replevin suit.

3. COSTS, § 73*—*when expense of additional abstract filed by plaintiff may not be taxed to defendant.* Where plaintiff filed an additional abstract of record and defendant's abstract contained all that was necessary, expense of such additional abstract cannot be taxed as costs against defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Treadwell v. Central Bank of West Lebanon, 198 Ill. App. 203.

Charles A. Treadwell, Appellee, v. Central Bank of West Lebanon, Warren County, Indiana, Appellant.

Gen. No. 21,950.

1. PLEADING, § 359*—*when plea of statute of another State should not be stricken summarily from files.* Pleas setting up statutes of another State and the construction thereof by such State do not set up matters of law and may not be summarily eliminated from the record on motion to strike from the files, but like every other question of fact should be permitted to remain as defenses.

2. PLEADING, § 359*—*when striking of pleas and affidavit of merits from files reversible error.* It is reversible error to strike the pleas and affidavits of merits of defendant from the files on motion and to proceed to judgment as in cases of default.

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This action is brought upon three certificates of deposit, of which plaintiff is the holder and owner by indorsement, issued by the defendant bank to Columbia Casualty Company. Among other defenses pleaded were the statutes of the State of Indiana governing negotiable instruments of the nature of the certificates of deposit in suit, together with an affidavit of meritorious defense. An amended affidavit of merits was filed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Treadwell v. Central Bank of West Lebanon, 198 Ill. App. 203.

by leave of court, setting up defenses claimed to inure to defendant in virtue of the statutes of Indiana and the decisions of the Indiana courts construing such statutes. This amended affidavit was on motion of plaintiff stricken from the files, and on like motion the pleas were for want of a sufficient affidavit of merits also stricken, damages were assessed by the court and judgment entered as in default cases, for \$496.37, and defendant appeals.

The trial court erred in thus summarily eliminating from the record the defenses interposed by defendant and assuming to construe the statutes of Indiana as matter of law. The Indiana statutes and the construction thereof by the Indiana courts were pleaded as matters of fact, and like every other question of fact the trial judge should have permitted the pleas to remain as defenses and allowed the statutes and decisions of Indiana to be given in evidence thereunder, in the same manner as any other question of fact is proven at law. After such evidence had been received in the case, then the facts so proven would become questions of law, and the duty of instructing the jury as to the law under the statutes and decisions of Indiana, so received in evidence, would devolve upon the trial judge. In *Barth v. Farmers & Traders Bank*, 195 Ill. App. 318, it was held to be reversible error to strike the pleas and affidavit of merits of defendant from the case and to proceed to judgment as in cases of default.

For the reasons and under the authorities set forth in this court's opinion in the *Barth* case, *supra*, the judgment of the County Court is reversed and the cause remanded for a trial under the pleas interposed by defendant to plaintiff's declaration.

Reversed and remanded.

**John M. Gavin, Appellee, v. State Bank of Monticello,
Indiana, Appellant.**

Gen. No. 21,951. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916.

Statement of the Case.

Action by John M. Gavin, plaintiff, against State Bank of Monticello, Indiana, defendant, to recover amount of certificate of deposit, with interest, issued by defendant bank to Columbia Casualty Company, which certificate plaintiff claimed was indorsed to him. From a judgment by default in favor of plaintiff, the defendant appeals.

The errors assigned in this case are the same as those in *Treadwell v. Central Bank of West Lebanon*, ante, p. 203, and court referring to such case holds that for the reasons stated in that opinion the judgment of the County Court should be reversed and remanded for new trial.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Albright v. Farmers & Traders Bank of La Fayette, 198 Ill. App. 206.

**Charles D. Albright, Appellee, v. Farmers & Traders
Bank of La Fayette, Indiana, Appellant.**

Gen. No. 21,952. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 7, 1916.

Statement of the Case.

Action by Charles D. Albright, plaintiff, against Farmers & Traders Bank of La Fayette, Indiana, on a certificate of deposit, title to which plaintiff claims by indorsement. From judgment by default for plaintiff, defendant appeals.

For the reasons stated in *Treadwell v. Central Bank of West Lebanon*, ante, p. 203, the judgment is reversed.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

United States Fidelity & Guar. Co. v. Dickason, 198 Ill. App. 207.

**United States Fidelity & Guaranty Company, Appellee,
v. Elizabeth G. Dickason, Executrix of the Last
Will and Testament of Livingston T. Dickason, De-
ceased, Appellant.**

Gen. No. 21,996.

1. **LIMITATION OF ACTIONS, § 116***—*when correspondence subsequent to date of tolling of statute of limitations inadmissible.* In Probate Court proceedings wherein the representative of the estate of one who agreed to indemnify a surety company contended against such company that the statute of limitations had run against interest prior to a specified date on the penalty of the bond sued on, *held* that letters offered by the company, dated subsequent to a certain date and after the statute of limitations had tolled, were properly excluded.

2. **EQUITY, § 79***—*when statute of limitations tolled as against interest on bond.* In proceedings in the Probate Court commenced on May 14, 1914, by a corporation which was surety on the bond of a contractor, who abandoned his contract on account of which the surety company paid the penalty of such bond, against the estate of deceased who had agreed in a condition of such bond to indemnify such corporation, and such corporation sought to charge interest against the estate from January 1, 1902, when the liability on the bond was fixed, and such estate contended that the statute of limitations had run against interest prior to June 7, 1911; and it appeared that deceased did not make any representations to such corporation inducing them not to commence action on the bond within the time when the statute of limitations was tolled, nor promise to pay the bond or amount of judgment thereon recovered against such corporation, but on the contrary denied his liability persistently; that such corporation never threatened suit within the period of the running of the statute, nor made demand upon deceased; that there was no proof of fraud, deceit or concealment of any fact which lured such corporation to refrain from suit against deceased within the proper time, and that deceased was not cognizant of any material fact in the matter not equally known to the corporation, *held* that the liability of the estate was for the penalty of the bond with interest thereon from June 7, 1911, and not from January 1, 1902.

3. **EQUITY, § 79***—*how statute of limitations applied in equity.* Equity courts in cases of concurrent jurisdiction are bound by the statute of limitations which govern the courts in like cases, and this, rather in obedience to the statute, than by analogy.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

United States Fidelity & Guar. Co. v. Dickason, 198 Ill. App. 207.

Appeal from the Circuit Court of Cook county; the Hon. SAMUEL C. SROUGH, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed March 7, 1916. Rehearing denied March 20, 1916.

PARKER & KING and ASHCRAFT & ASHCRAFT, for appellant.

JUDAH, WILLARD, WOLF & REICHMANN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This action was started by the filing of a claim in the Probate Court of this county, which was allowed for the amount claimed. From such allowance the executrix took an appeal under the statute to the Circuit Court. In the Circuit Court the claim was tried before the court with a jury and a judgment entered, bad in form, on a verdict instructed by the court, in the sum of \$33,663.85, and the executrix from that judgment prosecutes this appeal, seeking a modification of the amount of the judgment on the theory that neither the testator nor his estate is liable for interest on the penalty of the bond in suit prior to the time that appellee paid the judgment of the Federal Court of Kentucky against it and in favor of the Ohio and Kentucky Railroad Company.

The material condition of the bond, the subject matter of this litigation, is that if the obligors—

“C. E. Loss and L. T. Dickason, their heirs, executors and administrators, shall at all times hereafter save harmless and keep indemnified the said United States Fidelity & Guaranty Company, its successors and assigns, against all suits, actions, debts, damages, demands, costs, charges and expenses, including court costs and counsel fees, at law or in equity, and against all loss and damage whatever that shall or may at any time hereafter happen or accrue to the said United

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States Fidelity & Guaranty Company, its successors or assigns, for or by reason of the suretyship of the said United States Fidelity & Guaranty Company, as aforesaid, then this obligation to be void," etc.

We quote the following from the opening statement of counsel for appellant as being a fair statement of the case with admissions of fact binding appellant and which relieve appellee from the burden of proving that which, but for the admissions, would be incumbent upon it to prove:

"For the purpose of this trial I now admit that on January 8, 1900, Colonel Dickason executed the bond, copy of which is attached to the claim in this case, being a bond in the penal sum of \$20,000 to indemnify this claimant, the United States Fidelity & Guaranty Company, for signing the bond of C. E. Loss & Company to the Ohio and Kentucky Railway Company. I admit the execution of the bond of C. E. Loss & Company and the claimant on the same date, January 8, 1900, to the Ohio and Kentucky Railway Company and the delivery of each of these bonds on the day of their date; that C. E. Loss & Company, under its contract with the Kentucky and Ohio Railway Company, proceeded with its work on that contract mentioned in the bond; that on the 16th day of January, 1901, it abandoned that contract; that a claim was made against the Surety Company, the claimant in this suit, by the Railway Company, for damages during the year 1901; that the claim became an obligation in favor of the Ohio and Kentucky Railway Company on the 1st day of January, 1902, for the purpose of this trial, in the amount of \$35,000; that it brought suit on that claim in March, 1903; that Colonel Dickason was notified to defend that action; that he did defend the action in co-operation with the claimant here, the Surety Company; that they furnished all the aid and assistance they could in the defense of that action and that it resulted in a judgment for a total amount of \$30,126.66 against the claimant in this case; that on June 10, 1911," (should be June 7) "claimant in this case paid the Railroad Company \$32,748.11.

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“I admit a claim should be allowed in this case by the court and the jury against the estate of Colonel Dickason for \$20,000 and interest on that amount from the day the Surety Company paid that claim at the rate of 5 per cent per annum and the costs of this case.

“I admit that the breach on the liability side of this bond occurred the 1st of January, 1902.

* * * * *

“I admit that the claimant in this case notified Colonel Dickason to defend the suit; that he did defend the suit the best he could with the co-operation of the claimant; that the claimant hired its lawyer and Colonel Dickason hired his lawyer and they co-operated in the defense; that the Surety Company did all it could to aid in the defense in every way.”

Appellant introduced no evidence save the admissions of counsel already referred to. On the contention of appellant that the evidence in the case presented no fact for the determination of the jury, counsel moved the court to instruct the jury as follows:

“The court instructs you as law in this case, that the claimant is entitled to a verdict of \$20,000 and 5% interest per annum on that sum from June 7th, 1911, and you will so find.”

This motion the court overruled and refused to instruct the jury as requested. Thereupon appellee moved the court to give to the jury the following instruction:

“The jury are instructed that you should find in favor of claimant, United States Fidelity and Guaranty Company, in the sum of Twenty Thousand Dollars (\$20,000), together with interest thereon from January 1, 1902, to date, at the rate of five (5) per cent per annum, amounting to the sum of Thirteen Thousand Three Hundred Thirty Dollars and Fifty-five Cents (\$13,330.55), being the total sum of Thirty-three Thousand Three Hundred Thirty Dollars and Fifty-five Cents (\$33,330.55)”

which instruction, against the objection of appellants,

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the court gave, and a verdict in accord therewith was returned.

In this condition of the record it is apparent that, notwithstanding the very elaborate and able briefs of counsel, discussing with legal acumen every possible angle of the case on both law and fact, but one question is really in dispute, and this one question is the only question necessary to determine in order to settle the rights of the parties—that is, whether the statute of limitations was tolled as against interest upon the bond in suit. That question can be settled by determining which of the two instructions requested should have been given to the jury. The opinion of the learned trial judge found in appellee's brief, delivered orally at the close of the proofs, is of no assistance to the court and was not so intended, as is apparent from the judge's opening statement that: "This is both a new and interesting question to me, and all I can treat any of you to is a quitclaim opinion on the subject."

The following are the important dates and events involved in this suit: The liability on the bond was fixed in a suit in Kentucky between appellee and the Ohio and Kentucky Railroad Company, as of January 1, 1902. The litigation between the parties on this liability in the Kentucky Federal Court culminated in a judgment, from which no appeal was perfected, on June 9, 1910, for the penalty of the bond with interest from January 1, 1902. Appellee paid that judgment with interest on June 7, 1911. On March 22, 1913, Livingston T. Dickason, appellant's testator, died. The suit of the railroad company against appellee was commenced in March, 1903. The claim involved in this suit was filed in the Probate Court on May 14, 1914.

Counsel for appellee complain in their brief of the omission from the abstract of certain letters offered by them and excluded on the motion of appellant. While counsel for appellee failed to set forth these letters in

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their brief or by filing an additional abstract, we have gone to the record and find that the correspondence encompassed within these letters was subsequent to January 1, 1912, and after the statute of limitations, it is argued, was tolled. They were therefore properly excluded.

While it is admitted that the testator, in co-operation with appellee, defended the suit against the Ohio and Kentucky Railroad Company, we fail to find any evidence in this record, or any admission by appellant's counsel, that the testator made any representations to appellee or its counsel which induced them not to commence an action upon the bond within the time in which the statute of limitations was tolled. Nor was there any promise made by the testator that he would pay the bond or the amount of any judgment which the railroad company might obtain against appellee. On the contrary, the testator seems to have persistently not only avoided making any such promise, but openly denied his liability.

We can find nothing in this record, conceding the law to be as contended by appellee, which would raise an estoppel against appellant advantaging of the statute of limitations. Appellee never even threatened suit within the period of the running of the statute of limitations, and, furthermore, the testator made no promise to pay within that time. Had the statute of limitations expired during the defense of the railroad company's suit, a different question would be presented for solution; but at the time appellee paid the railroad company's judgment nearly seven months remained, before the expiration of the statute, in which it could have commenced suit against the testator upon the bond now in suit, during which time it remained inactive. During that seven months no demand was made upon the testator for payment and no excuse is made to appear why appellee did not during that time

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commence its action. Testator became liable under the "loss and damage" clause of the bond in suit at the time appellee paid the railroad company's judgment, June 7, 1911, and while the testator did not die for more than one year and nine months thereafter, no action was taken against him to force a recovery and no overt step looking to an enforcement of appellee's claim under testator's bond taken until the filing by appellee of its claim in the Probate Court on May 14, 1914,—nearly three years after the amount of the liability of the testator on the bond became fixed.

There is no proof that appellant's testator was guilty of any fraud, deceit or concealment of any fact which lured appellee to refrain from commencing suit to enforce its claim within the period of the running of the statute of limitations; nor does it appear from the record that appellant was cognizant of any material fact that was not equally known to appellee. Even were we to concede, which we do not, that appellee was in a position to invoke equitable defenses, such even would be unavailing in a court of equity. *Boone v. Colehour*, 165 Ill. 305, states the doctrine applicable to equitable defenses with precision.

As said in *Hamilton v. Downer*, 152 Ill. 651: "If it has ceased to be a charge through her failure to pursue in due time the remedy given by the statute, a court of equity will render her no assistance." And in *Godden v. Kimmell*, 99 U. S. 201, the court states the general rule thus: "Equity courts in cases of concurrent jurisdiction should consider themselves bound by the statute of limitations which govern courts of law in like cases, and this rather in obedience to the statute of limitations than by analogy."

We think the observation of the court in *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, is pertinent to the case at bar. " * * * But a party should not be allowed to trust too long to the anticipated outcome

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of such proceedings and until his right to legal remedies has been lost by lapse of time.”

We therefore conclude that the liability of appellant is for the penalty of the bond, \$20,000, with interest at five per cent. per annum from June 7, 1911, when appellee paid the judgment against it of the Ohio and Kentucky Railroad Company, to the present time.

The judgment of the Circuit Court is reversed and judgment entered here for \$24,750.

Reversed and judgment here for \$24,750.

**Tomasz Narkiewicz, Appellee, v. Valentine Wachowski,
Appellant.**

Gen. No. 22,008. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 7, 1916. Rehearing denied March 20, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action in assumpsit by Tomasz Narkiewicz, plaintiff, against Valentine Wachowski, defendant. From a judgment against him, defendant appeals.

This is a second appeal. The material facts in the case are contained in the decision on the previous appeal. See *Narkiewicz v. Wachowski*, 183 Ill. App. 318.

CHENEY & EVANS, for appellant; WHITE & WILSON, of counsel.

BEACH & BEACH, for appellee.

Trybon v. Miller, 198 Ill. App. 215.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when verdict on conflicting evidence not disturbed.* A verdict will not be disturbed as against the manifest weight of evidence where the evidence is in sharp conflict and a verdict might have been rendered for a larger sum.

2. TRIAL, § 191*—*when motion to direct verdict properly denied.* A motion to direct a verdict is properly denied where the questions raised are merely those of fact.

3. APPEAL AND ERROR, § 1088*—*what brief must contain.* The Appellate Court will not go to the record to ascertain the facts as to misconduct of counsel for the purposes of reversal where the particular conduct complained of does not appear in appellant's brief.

4. APPEAL AND ERROR, § 1413*—*when verdict not disturbed.* When two juries, as well as two trial judges, have concluded that the plaintiff's claim is meritorious and there is no substantial or prejudicial error apparent in the record, the Appellate Court will not disturb the judgment appealed from.

Oscar Trybon, Defendant in Error, v. August W. Miller, Plaintiff in Error.

Gen. No. 20,528. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed on remittitur. Opinion filed March 9, 1916.

Statement of the Case.

Action by Oscar Trybon, plaintiff, against August W. Miller, defendant, to recover for wages, overtime, and disbursements for car fare and telephone ex-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

penses. From a judgment for plaintiff for \$359.50, defendant brings error.

Defendant hired plaintiff to work from April 4, 1913, to November 23, 1913, to solicit consents for granite paving.

In his amended statement of claim plaintiff claimed that he was entitled to receive as wages \$80 for the month of April, \$85 for each of the months of May, June, July, August, September and October and \$65.40 for the month of November, or a total of \$655.40; that he received from defendant from time to time during the months of April to September, inclusive, as wages, the total sum of \$315, and that he also received from defendant on January 12, 1914, the sum of \$50, leaving a balance due him of \$290.40 for wages as distinguished from moneys due him for overtime and disbursements. The defendant, in his second amended affidavit of merits, admitted that plaintiff had earned as wages said total sum of \$655.40, but claimed that from time to time up to and including January 12, 1914, he had paid plaintiff the total sum of \$531, leaving only a balance due plaintiff for wages of \$124.40.

On the question as to the allowance of plaintiff's claim for \$69.10 for disbursements during the period of his employment for car fare and telephone expenses, defendant's evidence was to the effect that he at no time made any agreement with plaintiff to reimburse him for such expenses. While plaintiff testified that during the month of April, 1913, defendant gave him \$2 for car fare and telephone expense, he also testified that he had no further conversation with defendant relative to such expenses and that at no time during his employment did he render any bill to defendant for such expenses. In testifying plaintiff read from his account or memorandum book containing items of wages, overtime and expenses.

HEBEL & HAFT, for plaintiff in error.

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No appearance for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 84*—*when evidence sufficient to sustain verdict.* Finding by trial court that defendant owed plaintiff \$290.40 for wages, the evidence with regard thereto being conflicting, *held* not to be against the weight of the evidence.

2. MASTER AND SERVANT, § 84*—*when evidence insufficient to sustain finding that master promised to allow servant expenses.* Where plaintiff in action for wages claimed allowance of car fare and telephone expenses during his employment by defendant, and plaintiff testified that on one occasion defendant gave him \$2 for such expenses but that he had had no further conversation with defendant relative to such disbursement and that during his employment, a period exceeding seven months, he never rendered any bill to defendant for such expenses and there was no express promise by defendant apparent in the record, to reimburse plaintiff therefor, or sufficient evidence from which such promise may be implied, *held* such expenses should not be allowed plaintiff.

3. MASTER AND SERVANT, § 82*—*when use of memorandum by witness not prejudicial error.* In an action by a servant against his master for wages alleged to be due, *held* that the act of the court in allowing plaintiff to read from an account or memorandum book which contained items of wages received by him from time to time was not prejudicial error in the light of plaintiff's evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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The Rienzi Company v. Commissioners of Lincoln Park and Charles E. Affeld, on appeal of The Rienzi Company.

Gen. No. 20,574.

1. **CONTRACTS, § 139***—*when agreement between park commissioners and abutting property owners for maintenance and repair of street invalid as against public policy.* An agreement between a board of park commissioners in the City of Chicago and owners of property abutting on a street in such city, providing for the payment of a yearly amount per front foot by such owners to the commissioners, *held* contrary to public policy, where such commissioners had previously accepted an ordinance making it their duty to maintain and repair such street, on the grounds that park commissioners have no authority to compel abutting owners to pay for the *maintenance or repair* of a street after the making of the *initial improvement* as such expenses are to be met by general taxation.

2. **MUNICIPAL CORPORATIONS, § 159***—*what does not constitute a contract for improvement of streets for which municipality may accept aid from individuals.* A contract for payment of a certain annual sum by abutting owners to park commissioners for the maintenance of a boulevard does not come within the doctrine that a municipality may accept aid from individuals in making an improvement to a street, so as to constitute such contract valid and enforceable.

3. **CONTRACTS, § 85***—*when contract between park commissioners and abutting property owners for maintenance of street without consideration.* An agreement between the Board of Park Commissioners of the City of Chicago and the property owners abutting on a street, for the payment of a yearly amount per front foot by such owners for maintenance purposes, is invalid as being without consideration.

Appeal from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed March 9, 1916. Rehearing denied March 21, 1916.

Statement by the Court. On January 14, 1913, The Rienzi Company, an Illinois corporation, filed its

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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bill of complaint in the Superior Court of Cook county against the Commissioners of Lincoln Park and Charles E. Affeld, defendants. In the bill as amended it is alleged in substance, that complainant is the owner and in possession of Lots 10, 11, 12 and 13, in Block 3 in Le Moyne's Subdivision, etc., in Cook county; that it acquired title thereto by warranty deed dated July 1, 1912, from James Coupland and wife, who acquired their title by warranty deed, dated June 28, 1912, from the defendant Charles E. Affeld; that on July 19, 1888, there was filed for record in the office of the recorder of deeds of Cook county a certain "pretended agreement" as follows:

**"AGREEMENT OF PROPERTY OWNERS FOR MAINTENANCE AND
REPAIR OF DIVERSEY AVENUE BOULEVARD.**

"Whereas, the Board of Trustees of the Town of Lake View, in the County of Cook and State of Illinois, did by an ordinance approved Dec. 20, 1886, and by an amendatory ordinance approved May 2, 1887, grant permission to the Commissioners of Lincoln Park to accept and improve that portion of Diversey street in the said Town of Lake View lying East of Clark street.

"And Whereas, the Board of Commissioners of Lincoln Park hesitate to accept said street because of the expense of maintaining said drive after the same shall be improved by a special assessment.

"Now, Therefore, for the purpose of inducing the Commissioners of Lincoln Park to accept said street and for the purpose of providing a fund for the future maintenance of the portion of said Diversey street above mentioned, the undersigned owners of the property abutting thereon noted opposite our respective signatures hereto attached, hereby agree to pay, on or before the first day of May in each year, on request of the Commissioners of Lincoln Park, a sum not exceeding twenty-five (25) cents for each front foot of the property described opposite our respective names for the maintenance of said portion of Diversey street,

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and for the purpose of securing the payment of said sums respectively each of us, for himself and not for the others, hereby agrees that this covenant shall be made a charge or lien upon said property, to be enforced in any manner now or hereafter provided by law, and to this stipulation and covenant we severally bind our heirs, executors and assigns.

“In Witness Whereof, we have hereunto set our hands and seals, and described the lots owned by us respectively, this — day of November, A. D. 1887.”

That said document was signed by divers property owners owning property abutting on Diversey street, and among them the said defendant, Charles E. Affeld, who was then the owner of the property above described, his signature thereto being as follows: “C. E. Affeld, 186 feet, being for Lots 10, 11, 12 & 13 in Block 3, Le Moyne's Subdiv.”; that said document was not signed by the Commissioners of Lincoln Park; that said property abuts on what is now known as Diversey boulevard, and that at the time of the execution and the recording of said document, and in December, 1886, said street was known as that portion of Diversey street, lying east of Clark street, and was located within the Town of Lake View in said Cook county, and was under the jurisdiction of the board of trustees of said town; that said board of trustees, by ordinance approved December 20, 1886, and by an amendatory ordinance approved May 2, 1887, granted permission to said Commissioners of Lincoln Park to accept and improve said portion of Diversey street; that on June 7, 1887, said commissioners accepted said ordinances and accepted and assumed control and jurisdiction of said portion of Diversey street as a boulevard; that by said amendatory ordinance approved May 2, 1887, it was provided that said permission granted to said commissioners to take, control and improve said portion of Diversey street was granted upon the condition that “the cost of all improvement and re-

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pairs and maintenance'' of said boulevard ''shall be paid by the owners of property abutting thereon, to be assessed and collected on said abutting property *in the manner provided by law*;' that the only method then provided by law therefor was by general taxation or special assessment, and that said pretended agreement with said commissioners was in violation of the terms of the aforesaid ordinance; that the defendant Charles E. Affeld, for five years subsequent to the execution of said document, paid to said commissioners the amounts provided for therein and then discontinued such payments; that for more than fifteen years last past neither said Affeld, nor any other property owner signing said document and owning property abutting on said boulevard, have recognized the validity of the same, or paid any sums of money thereunder or for the purpose of improving or maintaining said boulevard, except as such payments were made by way of general taxes or special assessments levied by the proper corporate authorities upon and collected from the respective premises owned by the signers of said document; that said Commissioners now claim and pretend that there is due from said Affeld for unpaid instalments under said pretended agreement a large sum of money, and claim and pretend that by virtue thereof said commissioners have a lien upon said premises of complainant for said amount; that said claim is false, and that said claim and said pretended agreement so recorded constitute a cloud upon the title of complainant to said premises, depreciate the value thereof and render the same unsalable; and that said pretended agreement was and is void and of no effect. The bill prayed that said pretended agreement be adjudged a cloud upon the title of complainant and be removed as such, etc.

The defendant, Charles E. Affeld, filed an answer in which he admitted the material allegations of the bill.

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The defendant, Commissioners of Lincoln Park, filed an answer admitting that complainant was the owner and in possession of said premises, that the agreement mentioned in the bill was signed by said Affeld and others, and duly delivered to said commissioners, and recorded on July 19, 1888; that the ordinance and amendatory ordinance mentioned in the bill were passed, and that on June 7, 1887, said commissioners accepted said ordinances and assumed control and jurisdiction over said portion of Diversey street as a boulevard. The ordinance of December 20, 1886, is set out in full in the answer. It is recited in said ordinance that a majority of the owners in frontage of the lots abutting on Diversey street, east of Clark street, have presented their consent and petition to said board of trustees for the taking over by said Commissioners of Lincoln Park of said portion of Diversey street, laying east of Clark street, as a boulevard, upon the condition, among others, that "*one-half of the cost of all improvements and repairs and maintenance of said boulevard shall be paid by the owners of property abutting thereon, to be assessed and collected on said abutting property in the manner provided by law.*" It is further recited in the ordinance that the General Assembly of the State of Illinois has passed an act amending sections 1 and 2 of an Act entitled: "An Act to enable park commissioners and corporate authorities to take, regulate, control and improve public streets leading to public parks; to pay for the improvement thereof, and in that behalf to make and collect a special assessment or special tax on contiguous property," approved April 9, 1879. It is further recited in the ordinance that the Board of Lincoln Park Commissioners are desirous of taking over said portion of Diversey street, east of Clark street, for the uses and purposes in said act mentioned, and that it is deemed desirable that the prayer of said petition be granted. It is then provided in the ordinance that the consent

be given to said commissioners to take, control and improve said portion of Diversey street in manner and form as provided in said act of the General Assembly, subject to the rights and powers on the part of said Town of Lake View as to the laying of gas and water pipes and the building and repairing of sewers, etc. After the setting out of the ordinance of December 20, 1886, the answer alleges that said commissioners refused to accept said ordinance or to assume control or jurisdiction over said portion of Diversey street *unless* the owners of the property abutting on said proposed boulevard would agree to pay *the cost* of all improvements and repairs and maintenance of the same; that thereupon, and before the passage of said amendatory ordinance of May 2, 1887, the owners of the property abutting on said proposed boulevard "did agree to pay the cost of all improvements and repairs and maintenance" of said portion of Diversey street "if accepted by The Commissioners of Lincoln Park"; and that thereupon the said amendatory ordinance was duly passed. This amendatory ordinance of May 2, 1887, is set out in full in the answer. It is therein provided that the ordinance of December 20, 1886, "is hereby amended so that the consent therein given and granted shall be upon the further condition that *the cost* of all improvements and repairs and maintenance of the boulevard * * * shall be paid by the owners of property abutting thereon, to be assessed and collected on said abutting property *in the manner provided by law.*" The answer further alleges, in substance, that said Charles E. Affeld continued to make payments for *maintenance* of said boulevard to said commissioners, under the agreement mentioned in the bill, for a period of twelve years up to April 1, 1899, but that since then he has refused to make payments thereunder; that on August 13, 1912, this defendant, Commissioners of Lincoln Park, commenced a suit in assumpsit against

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him in the County Court of Cook county for the amount then due and unpaid, about \$650, which suit is now pending and undetermined, and that there is now due this defendant from said Affeld the sum of \$697.50, and lawful interest thereon. The answer denies that the claim against said Affeld is false, or that said agreement constitutes a cloud upon the title of complainant for the reasons charged in the bill; and further alleges, in substance, that the defendant is a municipal, or *quasi* municipal, corporation and by law has acquired jurisdiction and control over said portion of Diversey street, and has publicly exercised such control and jurisdiction for more than twenty-five years last past, during all of which time this defendant has improved and maintained said street so that it has caused the property of said Affeld to rise in value, etc.; that by reason of said agreement and the maintenance of said boulevard by this defendant, the said Affeld, and the other property owners on said boulevard, were spared the expense and cost of frequent special assessment proceedings for the improvements of said street, all of which said Affeld has for more than twenty-five years acquiesced in; and that by reason of said acquiescence and acceptance of benefits by him and his assigns complainant is estopped from now attacking the validity of said agreement.

On October 29, 1913, said defendant, Commissioners of Lincoln Park, filed its cross-bill against complainant and said Charles E. Affeld, in which it alleges, in substance, that it is a corporation organized under an act of the General Assembly, approved and in force February 8, 1869, and amendments thereto; that said ordinance of December 20, 1886, and said amendatory ordinance of May 2, 1887, were passed by the Board of Trustees of the Town of Lake View; that the same were accepted by cross-complainant on June 7, 1887, upon the conditions therein stated; that thereupon, in November, 1887, in compliance with the condi-

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tions named in said ordinances, the owners of a majority of the frontage on said portion of Diversey street, including said Affeld, executed and delivered the agreement set out in complainant's bill, and the same was recorded on July 19, 1888; that cross-complainant took upon itself the control, management and jurisdiction over said portion of Diversey street as a boulevard, has made all necessary improvements and repairs, and maintained the same as a boulevard up to the present date and ever since the time of the entering into of said agreement; that said Affeld, from May 1, 1888, to about May 1, 1899, continued to pay to cross-complainant each year, on or before May 1, the sum of \$47.50, but that since May 1, 1899, he has refused to pay said annual instalment of \$47.50, as in equity and good conscience he was bound to do; that on July 1, 1912, The Rienzi Company acquired title to the premises in question, at which time there was due to cross-complainant for the *maintenance* of said boulevard the sum of \$617.50, which, by the terms of said agreement of November, 1887, was a charge or lien upon said premises, and was a binding obligation upon said Rienzi Company, but which amount it has refused to pay; and that said agreement is a valid and legal contract and binding both upon said Affeld and The Rienzi Company. The cross-bill prayed that an account be taken and that both said Affeld and The Rienzi Company be decreed to pay cross-complainant whatever sums may be found due to it, and that in default of payment the said premises be sold, etc.

To this cross-bill separate answers were filed by The Rienzi Company and Affeld, in which they denied that anything was due from either of them by virtue of said agreement, and alleged the invalidity of said agreement for reasons substantially as set forth in the original bill of The Rienzi Company. Replications were filed to the answers to the bill and to the cross-bill.

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After a hearing in open court before the chancellor, a decree was entered, March 13, 1914, dismissing complainant's bill (as amended) for want of equity, finding the equities with the cross-complainant, Commissioners of Lincoln Park, and adjudging that unless the cross-defendant Charles E. Affeld, or the cross-defendant The Rienzi Company, or one of them, pay or cause to be paid to the cross-complainant, within thirty days, the sum of \$418.87, the said premises be sold, etc. From this decree The Rienzi Company and Charles E. Affeld severally prayed appeals to this court, which were allowed and subsequently perfected. This is the appeal of The Rienzi Company.

The decree contained full findings of facts and the further finding that the facts as found were all the material facts proved at the hearing. The decree recites in *haec verba* the original ordinance of December 20, 1886, and the amendatory ordinance of May 2, 1887, the acceptance of said ordinances by the Commissioners of Lincoln Park on June 7, 1887, the property owners' agreement thereafter signed on the——day of November, 1887, and further recites that said agreement was delivered to and accepted by said Commissioners and recorded July 19, 1888, and that about the time of the acceptance thereof the commissioners took control, management and jurisdiction over said portion of Diversey street as a boulevard, and have since managed and maintained the same as a boulevard. The decree further finds, in substance, that on January 15, 1900, the Town of Lake View, at the instance of said commissioners, filed its petition in the Superior Court of Cook county for the confirmation of a special assessment for the "improvement of said Diversey boulevard east of Clark street as a Lincoln Park boulevard"; that said special assessment was duly confirmed on January 10, 1901, as against the property of Charles E. Affeld, as well as against other property; that thereupon in the years 1901 and 1902 said Affeld "paid the

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amount of said special assessment levied against the premises in question, being more than the sum of \$800," and that said improvement of the street was duly made as provided; that said special assessment proceedings "did not take the place of or abrogate the agreement hereinbefore described—but that said special assessment was for a new improvement of said street"; that after said special assessment proceedings the Commissioners of Lincoln Park continued to control and maintain said portion of Diversey street as a boulevard; that after the confirmation of said special assessment, and since the year 1901, the said Affeld has refused to pay to the commissioners "his proportion of the cost of said *maintenance* as provided in said agreement," although the commissioners have from year to year demanded of him and of various other owners the amounts of 25 cents per front foot as the same accrued; that ever since the execution of said agreement the corporate authorities of the Town of Lake View, at the instance of the commissioners, have from year to year caused to be levied upon all taxable property in said town, as provided by statute, a park tax for the maintenance and government of Lincoln Park and all boulevards and streets under the control of said commissioners; that said taxes have been levied against the premises of complainant and been paid yearly by said Affeld, while he was the owner thereof, as a part of the general taxes, and by complainant since it became the owner thereof, and that said commissioners have received and applied all such park taxes so levied against said premises for the purpose of *maintaining* said park system, including Diversey boulevard; that beginning with the year 1888 and up to and including the year 1900, said Affeld has paid for the maintenance of said portion of Diversey boulevard the sum of 25 cents per foot of his said premises; that from the year 1903 to and including the year 1912, the annual expense to said commissioners for

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the maintenance of said boulevard has ranged from .203 cents per front foot in 1903, to .527 cents in 1912; that there is due said commissioners from May 1, 1903, to May 1, 1913, under the terms of said agreement, the total sum of \$418.87 for the maintenance of said boulevard for said premises; that said commissioners are not entitled to recover any amounts under said agreement accruing prior to a period of ten years next preceding the filing of the bill herein, the said amounts being barred by the statute of limitations; that said Charles E. Affeld is legally obligated to pay said amount of \$418.87 so found due to said commissioners, as well as any and all future amounts which may accrue to said commissioners, under the terms of said agreement, against said premises, and that said sum of \$418.87 constitutes a lien and charge upon said premises, and that the interest of The Rienzi Company in said premises is subject thereto; that there is no evidence that said Affeld signed the petition to the Town of Lake View relative to payment by abutting property owners on Diversey street of the cost of all improvements, repairs and maintenance of said boulevard, as recited in the ordinances of December 20, 1886, and May 2, 1887, but that there is evidence that said Affeld was in favor of said street being turned over at that time to said commissioners by said town for the purpose of said boulevard, and that he made no objections to said commissioners assuming control and jurisdiction thereof.

VINCENT D. WYMAN, CHARLES E. CARPENTER and OTTO W. JURGENS, for The Rienzi Company.

RICHBERG, ICKES & RICHBERG, for Charles E. Affeld.

FRANCIS O'SHAUGHNESSY, for Commissioners of Lincoln Park,

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MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

It is contended that the court erred in dismissing the bill as amended, and in not dismissing the cross-bill for want of equity.

Section 21 of the act entitled "An Act to fix the boundaries of Lincoln Park in the City of Chicago, and provide for its improvement," approved and in force February 8, 1869, provided, among other things, that the Commissioners of Lincoln Park shall in regard to said park "possess all the power and authority now by law conferred on or possessed by the common council of said city in respect to the public squares and places in said city." Section 17 of said act required the commissioners each year to make an estimate of the amount necessary to be expended for the improvement and repair of said park and drive during the next succeeding year and to certify the same to the county clerk, to be by him extended, as a "Lincoln Park Tax," upon the taxable property in the towns of North Chicago and Lake View; and it is therein further provided that the taxes so collected shall be paid to the commissioners and used by them in improving and keeping in repair the park and drive. By section 2 of the Act of April 19, 1869, said section 17 was repealed, and the commissioners were directed to make an estimate of the amount of money required to pay any debt falling due during the next year and for the improvement, maintenance and government of Lincoln Park during the next succeeding year, which estimate shall be certified to the supervisors of said towns, who shall determine the amount of tax necessary for the purpose and certify the same to the county clerk, who shall extend the same as a "Lincoln Park tax," and the "taxes so levied and collected shall be paid to the Commissioners of Lincoln Park and by them applied to purposes aforesaid." On April 9, 1879, the Legislature passed an act entitled "An Act to enable

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Park Commissioners or Corporate authorities to take, regulate, control and improve public streets leading to public parks; to pay for the improvement thereof, and in that behalf to make and collect a special assessment or special tax on contiguous property." (Laws Ill. 1879, p. 216.) Sections 1 and 2 of said act were amended by an act approved June 27, 1885. (Laws Ill. 1885, p. 225.) Section 1 (as amended) provided, in substance, that every board of park commissioners shall have power to connect any public park, boulevard or driveway under its control with any part of any incorporated city, town or village, by selecting and taking any connecting street or streets, or part thereof, leading to such park, *providing* there be first obtained the consent of the corporate authorities having control of such street or streets, and also the written consent of the owners of a majority of the frontage of the lots and lands abutting on such street or streets so far as taken. Section 2 (as amended) conferred power on such board of park commissioners to improve, maintain and repair such street or streets as they might deem best, and such board were authorized from time to time to levy or cause to be levied or collected a special tax or assessment on contiguous property abutting on such street so improved, "for a sum of money not exceeding the estimated cost of such improvement or improvements *and* for the *future maintenance and repair thereof*, as shall be ordered and estimated by such board of park commissioners"; and to that end it was further provided therein that such board should have all the power and authority then or thereafter granted to them relative to the levy, assessment and collection of taxes or assessment for corporate purposes. Said act (as so amended) was in force when the ordinance of December 20, 1886, and the amendatory ordinance of May 2, 1887, were passed by the Board of Trustees of the Town of Lake View. It is quite probable that the provision in the amenda-

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tory ordinance of May 2, 1887, ceding control of said portion of Diversey street to the Lincoln Park Commissioners upon condition that "the cost of all improvement, and repairs and maintenance" of the boulevard should be paid by the owners of property abutting thereon, "to be assessed and collected on said abutting property *in the manner provided by law*," had reference to the provision contained in said section 2 (as amended) relative to "future maintenance and repair." By an act of the Legislature, approved June 16, 1887, said section 2 was again amended, and boards of park commissioners were authorized to cause to be levied and collected a special tax or assessment on contiguous property "for a sum of money not exceeding the estimated cost of such *first* improvement or improvements as shall be ordered and estimated by such board of park commissioners, *but not for any subsequent care, maintenance or repair thereof*." (Laws Ill. 1887, p. 247.) Said section 2 was further amended by an act of the Legislature, approved May 25, 1909 (Laws Ill. 1909, p. 294), but the words last above quoted were unchanged. On June 17, 1893, the Legislature passed an act entitled "An Act to authorize corporate authorities having jurisdiction and control of parks and boulevards to levy a special tax upon contiguous property abutting on boulevards and pleasureways, for the *maintenance and repair thereof*." In the case of *Crane v. West Chicago Park Com'rs*, 153 Ill. 348, our Supreme Court at the October term, 1894, decided that said act was unconstitutional and void. The court, quoting from *Hammett v. Philadelphia*, 65 Pa. St. 155, said (p. 353): "Repairing streets is as much a part of the original duty of the municipality—for general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." During the year following the decision in the *Crane* case,

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supra, the Legislature, on June 21, 1895, passed an act entitled "An Act to enable Park Commissioners or park authorities to take, regulate, control and improve public streets, and to pay for the improvement thereof." In section 2 of the act it is expressly provided that "no such special tax, or special assessment, shall be levied for the *maintenance and repair* of said improved street, but the same shall be maintained and repaired by said park boards or park authorities as in other cases." (Laws Ill. 1895, p. 291.)

From the above we think it appears that, by the public policy of the State, park commissioners have not had, at least since the adoption of the Constitution of 1870, power or authority to compel abutting property owners by special assessment to pay for the *maintenance or repair* of a boulevard after the making of the initial improvement, but that the expense of such maintenance or repair must be met by general taxation. And we are of the opinion that the agreement of November, 1887, is without consideration and contrary to public policy. The court found in the decree that on June 7, 1887, the Commissioners of Lincoln Park accepted the ordinance of December 20, 1886, as amended by the ordinance of May 2, 1887. This acceptance was prior to the date of the agreement, and by virtue of the acceptance it became the duty of the commissioners, after the making of the initial improvement, to *maintain and keep in repair* said portion of Diversey street as a boulevard. (*City of Alton v. Hope*, 68 Ill. 167, 169.) The doing by the commissioners of acts which they were required to do by law is not a consideration for the promise of Affeld and others. (20 Am. & Eng. Encyc. Law, 2nd Ed., 1159; *City of St. Louis v. The Maggie P.*, 25 Fed. Rep. 202; *Randolph County Com'rs v. Jones*, 1 Ill. 103.)

It is contended by counsel for the commissioners that, under the doctrine that a municipality may accept aid from individuals in making an *improvement*

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to a street, the contract in question is valid and may be enforced. We do not think that the cases cited in support of the contention are in point. They are cases where the contracts were made with reference to contemplated improvements. The contract in question has reference to the future *maintenance* of the street, not to the *improvement* thereof.

Our conclusion is that the court erred in dismissing the bill of The Rienzi Company for want of equity and in entering the decree on the cross-bill in favor of the Commissioners of Lincoln Park. The decree is reversed and the cause remanded with directions to dismiss the cross-bill for want of equity, and to enter a decree in favor of The Rienzi Company, complainant, in accordance with the prayer of its bill as amended.

Reversed and remanded with directions.

The Rienzi Company v. Commissioners of Lincoln Park and Charles E. Affeld, on appeal of Charles E. Affeld.

Gen. No. 20,612. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed March 9, 1916. Rehearing denied March 21, 1916.

Statement of the Case.

This appeal of Charles E. Affeld is taken from the same decree which was considered in *Rienzi Co. v. Commissioners of Lincoln Park*, ante, p. 218, in which proceedings he was one of the defendants in a cross-bill filed by the Commissioners of Lincoln Park. For

O'Neill v. Metz, 198 Ill. App. 234.

the reasons stated in that decision the decree is reversed with directions to enter a decree in favor of The Rienzi Company in accordance with the prayer in its bill as amended.

VINCENT D. WYMAN, OTTO W. JURGENS and CHARLES E. CARPENTER, for The Rienzi Company.

RICHBERG, ICKES & RICHBERG, for Charles E. Affeld.

FRANCIS O'SHAUGHNESSY, for Commissioners of Lincoln Park.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Charles C. O'Neill, Defendant in Error, v. Oscar Metz, Plaintiff in Error.

Gen. No. 21,042. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 9, 1916.

Statement of the Case.

Action by Charles C. O'Neill, plaintiff, against Oscar Metz, defendant, to recover a balance due of ninety dollars, on the sale to defendant of one second hand steam boiler and four second hand steam radiators at the agreed price of one hundred dollars, of which ten dollars had been paid by defendant. From a judgment in favor of plaintiff, defendant brings error.

In his affidavit of merits defendant set up the defense that plaintiff expressly warranted that the goods were "sound and fit for the purpose of using the same

in defendant's building," that defendant relied upon the warranty and paid plaintiff ten dollars as part of the purchase price, and after delivery and installation in defendant's building they were found to be unsound and unfit for said purpose and of no value, to defendant.

A. L. WILLIAMS, for plaintiff in error; GEORGE H. SUGBUE, of counsel.

GROVER C. NIEMEYER, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 329*—*when evidence insufficient to establish implied warranty as to soundness and fitness.* In an action to recover the balance due on the purchase price of one secondhand steam boiler and four secondhand steam radiators, evidence held insufficient to establish an implied warranty as to soundness and fitness of the goods.

2. SALES, § 329*—*when evidence insufficient to establish an express warranty as to soundness and fitness.* In an action to recover the balance due on the purchase price of one secondhand steam boiler and four secondhand steam radiators, evidence held insufficient to establish an express warranty as to soundness and fitness of the goods.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Behrends v. Chicago, Rock Island & Pacific Ry. Co., 198 Ill. App. 236.

F. Behrends, Defendant in Error, v. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.

Gen. No. 21,090.

1. CARRIERS, § 243*—*when bill of lading limiting liability for delay in shipment of live stock not effectual.* A bill of lading limiting the liability of the carrier for damages for delay in shipment of live stock in order to be binding, must be delivered to the shipper at the time the stock is accepted for carriage, unless there is an agreement that it shall be delivered at a future time.

2. CARRIERS, § 248*—*when evidence sufficient to sustain finding as to damages for delay in shipment of live stock.* In suit by shipper of cattle against a railroad on account of unreasonable delay in shipment and mixture while in transit with other cattle, evidence of plaintiff's damages held sufficient to sustain finding and judgment in his favor.

3. CARRIERS, § 250a*—*what is measure of damages for delay in shipment of live stock.* Unless otherwise legally limited by the contract of carriage, the measure of damages for delay in shipment of live stock is the difference between the market value of the consignment at the time and in the condition it should have arrived and its fair, cash market value in the condition and the time it actually arrived at its destination, plus the necessary expenses caused to the shipper by the delay.

Error to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed March 9, 1916.

M. L. BELL and A. B. ENOCH, for plaintiff in error.

FULTON, GAREY & DEUTSCHMAN, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

This action was commenced in the Municipal Court of Chicago on February 17, 1913. In plaintiff's amendment to his original statement of claim, filed April

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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24, 1913, it is stated that plaintiff's claim is "for money damages incurred to a shipment of 22 calves; 6 cows, very good; 6 cows, medium; 3 heifers, fat; and 3 steers, fat; the property of plaintiff shipped from Conger, Minnesota, on, to-wit, March 30, 1912, via said defendant, to Chicago, Illinois, arriving there-at on, to-wit, April 2, 1912; said damage being incurred by reason of the unreasonable delay in said transit and by reason of the negligence of said carrier during said transit in that said defendant allowed said stock to become mixed during said transit." To this defendant filed an affidavit of merits in which it was denied that there was any unreasonable delay in transit or that any damages were suffered by plaintiff by reason thereof, or that it was guilty of any negligence, or that said stock had become mixed during transit. Subsequently defendant filed an amendment to its affidavit of merits in which it was alleged that the said shipment of stock moved under a *written* contract, entered into between plaintiff and defendant, known as a "Live Stock Contract," and that in said contract it was provided, *inter alia*, that the live stock was not to be transported in any specified time or in season for any particular market; that as a condition precedent to the recovery for any loss or injury or detention the shipper should promptly give written notice of such loss or injury to some agent of the company before said stock be removed from the cars or mingled with other stock, which notice should be served within one day after the delivery of the stock at its destination, and that no suit should be instituted more than six months after the cause of action accrued. It was further alleged that plaintiff had not served the written notice referred to in said contract and that no suit had been commenced within said six months.

The cause was tried before the court without a jury. The depositions of plaintiff and two of his witnesses were read in evidence. One F. S. Boothroyd, engaged

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in the live stock commission business at the Union Stock Yards, Chicago, also testified as plaintiff's witness in open court. No evidence whatsoever was introduced by defendant concerning the shipment of March 30, 1912, in question. The court found the issues against defendant and assessed plaintiff's damages at \$129.50, upon which finding judgment was entered.

It is contended by counsel for defendant that the court erred in entering any judgment in favor of plaintiff for the reason that it appears from plaintiff's testimony that a written contract or bill of lading was signed by plaintiff which was not introduced in evidence by *plaintiff*. In support of their contention counsel rely upon the case of *Kitza v. Oregon Short Line R. Co.*, 169 Ill. App. 609. It appears from the opinion in that case that the shipper of the sheep in question had signed a written contract or bill of lading, after reading the same, at the time of the making of the shipment and *before* the transit of the sheep had commenced. It was *held* that the burden of proof was upon the *shipper* to prove the *written* contract upon which the shipment was made, and that failing to do this he could not recover upon an alleged *verbal* contract which did not exist, the same having been superseded by said *written* contract. In the present case it appears from the uncontradicted testimony of plaintiff that before March 30, 1912, he had made arrangements with the agent of defendant, at Conger, Minnesota, for the shipment of the cattle on that day; that he himself loaded the cattle in the cars on March 30, 1912, and that the loading was completed by 9 o'clock on the evening of that day and the cattle were then ready to start; that after said loading was completed he for the first time heard that a dam near a bridge at Albert Lea, Minnesota, had broken down and that a flood was impending which might delay the transit of the cattle; that said agent of defendant then

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wanted him "to sign a paper," which he refused to do, saying that he "wouldn't be responsible if anything happened down there," and that said agent told him that the cattle would be carried forward immediately that evening; and that about *two weeks after* the cattle had been shipped and after plaintiff had made a claim against defendant for damages on said shipment said agent requested him to sign some sort of a contract, which he did, after said agent had stated to him that his signing it would make no difference and that he would get his claim anyway. Under the facts as disclosed we do not think there is any merit in counsel's contention or that the ruling in the *Kitza* case, *supra*, is applicable. "To make the terms and conditions of the receipt effectual in limiting the liability of the carrier, it must be delivered to the shipper of the goods at the time they are accepted for carriage, unless there is an agreement that it shall be delivered at some future time." (Hutchinson on Carriers, 3rd Ed., sec. 416; see also, *Gemberling v. Grand Trunk Western Ry. Co.*, 192 Ill. App. 53, 56; *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, 262 Ill. 400, 405.)

It is also contended that plaintiff's evidence as to damages is not certain enough to sustain the judgment or any judgment against defendant. It appears from the evidence that the cattle arrived at the Union Stock Yards in Chicago at 11 o'clock on Tuesday morning, April 2, 1912, and were there unloaded. There was evidence tending to show that a reasonable time for a shipment of cattle to move from Conger to Chicago was about thirty-five hours, and that cattle leaving Conger at 9 o'clock on the evening of Saturday, March 30, 1912, would usually arrive in Chicago at or shortly before 8 o'clock on the morning of April 1, 1912. There was also evidence introduced as to shrinkage. "Unless otherwise legally limited by the contract to carry, the measure of damages by reason of a delayed shipment is the difference between the market value

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of the consignment at the time and in the condition it should have arrived and its fair, cash market value in the condition and at the time it actually did arrive at its destination, * * * plus the necessary expenses to the shipper caused by the unusual delay." (*Idaho Sheep Co. v. Oregon Short Line R. Co.*, 188 Ill. App. 591, 599.) There was also evidence tending to show that during the transit the cattle became mixed with other cattle and that some of the cattle received in Chicago were not the same as shipped from Conger and inferior to those as shipped. Without further discussion of the evidence we deem it sufficient to say that, in our opinion, the evidence as to plaintiff's damages was sufficient to sustain a finding and judgment in his favor in the amount, at least, of the finding and judgment as rendered.

The judgment of the Municipal Court is affirmed.

Affirmed.

Merrick Bush, Defendant in Error, v. Farrington Automobile Company, Plaintiff in Error.

Gen. No. 21,150. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 9, 1916.

Statement of the Case.

Action by Merrick Bush, plaintiff, against Farrington Automobile Company, defendant, for commissions due plaintiff on account of sales of automobiles. From a judgment in favor of plaintiff, defendant brings error.

Plaintiff claimed commissions due him as salesman on three separate sales. One of the sales was to a man named Erncke, on which sale plaintiff claimed,

and defendant admitted, a balance of \$50 due plaintiff. Another sale was to a man named Blair, on which sale plaintiff claimed a commission of \$127.50. The third sale was to a man named Tydings, on which sale plaintiff claimed that defendant agreed to pay him "\$100 if defendant should be able to enforce the sale, or \$50 if the deal did not go through." The defendant denied owing plaintiff anything on the Blair and Tydings sales and claimed a set-off of \$131.30 for the expense of making repairs on a certain car which had been damaged because of the unskilful driving of the same by a prospective customer, during a "demonstration" of the car, permitted by plaintiff. The case was tried before a jury who returned a verdict for plaintiff in the sum of \$210, upon which verdict judgment against the defendant was entered. Both counsel agreed that the jury in arriving at their verdict allowed plaintiff \$50 on the Erncke sale, \$110 on the Blair sale and \$50 on the Tydings sale, and disallowed, *in toto*, defendant's claim of set-off. Plaintiff was the only witness on his own behalf in making his case in chief. The principal witness for defendant was William H. Farrington, president of defendant. The testimony of these two witnesses was very conflicting on material points. A bookkeeper of defendant and an employee of defendant in its repair department also testified for defendant. Plaintiff and two other witnesses in his behalf gave testimony in rebuttal.

MCARDLE & MCARDLE, for plaintiff in error.

GUERIN & BARRETT, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

North End Paper Co. v. State Bank of Chicago, 198 Ill. App. 242.

Abstract of the Decision.

1. EVIDENCE, § 475*—*when preponderance of evidence is in favor of plaintiff.* Where plaintiff's testimony is overcome by the testimony of one witness for defendant on many material points, it cannot be said that the preponderance of evidence is not in favor of the plaintiff.

2. EVIDENCE, § 476*—*what does not constitute weight of evidence.* The mere fact that more witnesses testify on one side than on the other does not, of itself, determine the weight of evidence.

3. SET-OFF AND RECOUPMENT, § 40*—*when evidence insufficient to establish claim of set-off.* In suit by an automobile salesman for commissions due him, evidence held sufficient to sustain a finding disallowing a claim of set-off for expense of making repairs on a certain car, alleged to be due to the unskilful driving of the same by a prospective customer during a "demonstration" of the car.

North End Paper Company, Plaintiff in Error, v. State Bank of Chicago, Defendant in Error.

Gen. No 21,188.

ATTORNEY AND CLIENT, § 61*—*when attorney implied authority to indorse check received in payment of collection to bank.* In an action of trover for the conversion of a check, of which plaintiff, a foreign corporation, payee, and defendant, a local bank, indorsee and which had been converted after it had been indorsed to defendant by a local attorney, who had been instructed by plaintiff's foreign attorney to collect a local account from plaintiff's debtor, where such account was paid in part by such check drawn to plaintiff's order and where plaintiff's foreign attorney instructed the local attorney to remit amount collected less fees and enough to start suit on the balance, and such local attorney indorsed the check with plaintiff's name and his own to defendant bank which credited his account therewith, held, that the local attorney had implied authority to indorse the check to the bank and that there could consequently be no recovery against the latter.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

North End Paper Co. v. State Bank of Chicago, 198 Ill. App. 242.

Error to the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 9, 1916.

CAVENDER, KAISER & WERMUTH, for plaintiff in error.

BUTZ, VON AMMON & JOHNSTON, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

The North End Paper Company, a New York corporation having its principal office at Fulton, New York, brought an action against the State Bank of Chicago, in the County Court of Cook county, in trover for the conversion, on March 25, 1914, of a certain bank check for the sum of \$330.92. The check was drawn by Hanchett Paper Company, a corporation having its principal office in Chicago, Illinois. The defendant filed a plea of the general issue. The case was tried before the court without a jury upon a stipulation of facts. The court found the defendant not guilty and entered judgment against the plaintiff for costs.

The facts as stipulated are, in substance as follows: On March 13, 1914, Claude E. Guile, an attorney at law at Fulton, New York, was duly authorized by plaintiff to forward, and did forward, for collection, to Percival Steele, then a duly licensed attorney at law in Chicago, a claim of plaintiff against said Hanchett Paper Company for the sum of \$616.26. In the letter which accompanied the claim, Guile stated that it was important to his client (plaintiff) that the collection of the claim be made at once and that Steele should "leave no stone unturned to get the money," and requested Steele to wire if the claim was not paid on presentation. On March 17th Steele wrote Guile that Hanchett Paper Company had stated to him that it

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would pay all or one-half of the account by Wednesday, March 25th, and that he thought it advisable to wait until that date. On March 30th Guile wired Steele inquiring if the account had been paid, to which Steele wired a reply and also wrote a letter to the effect that the Hanchett Paper Company had given him a check for \$330.92, and had promised payment of the balance on April 15th, and that in view of the payment he deemed it advisable to wait. On April 2nd Guile wired in reply: "Please remit amount collected North End against Hanchett Paper Company, *less fees and less enough to start action on balance.*" Guile on the same day wrote Steele, confirming the telegram and saying: "Unless these debtors will promise to pay the interest on this account, and your fees for collection, we want you to bring an action against them for the balance due and the interest on the whole account at once." On the morning of April 3rd Steele died. In the meantime, on March 25th, the Hanchett Paper Company had delivered to one Hoering, a duly authorized agent of Steele, its check for \$330.92, payable to the order of "North End Paper Co.," and drawn on the National City Bank of Chicago, where it then had funds on deposit. Hoering, with Steele's authority, took the check to the defendant bank, where for a long time previously Steele had had a checking account, and indorsed the check "North End Paper Co.," and immediately thereunder, "Percival Steele," and deposited the same to the credit of Steele's account with the defendant bank, and said check was regularly paid through the Chicago Clearing House on March 26th. At the time the check was deposited Steele's account with the defendant bank was overdrawn in the sum of \$39.86. Afterwards checks were drawn by Steele and charged to said account, and at the time of his death, April 3rd, there remained to his credit, including the credit of said check for \$330.92, the sum of \$113.99. Plaintiff received no part of the proceeds of said check.

Counsel for plaintiff contend that an agent, or attorney at law, employed to collect a claim and to compound, discharge and give releases therefor, who receives in payment of said claim a check payable to the order of his client, has no authority to indorse said check in the name of his client unless such authority is *expressly* given. Counsel for defendant, on the other hand, contend that, under the facts of this case, where it appears that Steele was employed by the authorized agent of plaintiff to make a collection for plaintiff and was expressly instructed to "leave no stone unturned to get the *money*," and that plaintiff was at a place far distant from where Steele and plaintiff's debtor resided, Steele had at least *implied* authority to indorse plaintiff's name to the check in question received in due course of his employment, and that defendant is not liable to plaintiff in the present action.

Under all the facts of this case and under the following adjudicated cases, we are of the opinion that the trial court did not err in rendering the judgment in favor of defendant. (*National Bank of Republic v. Old Town Bank of Baltimore*, 112 Fed. 726; *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698; *Same v. Same*, 65 Neb. 483, 485.) In the case first cited the facts were somewhat similar to the facts in the present case. A Chicago attorney, named Fairman, had received certain checks payable to the order of his clients in payment of certain sums of money which they had employed him to collect and which were due them from certain executors. He indorsed the checks in the names of his clients and deposited them to the credit of his account with the National Bank of the Republic of Chicago and they were subsequently paid. He had no *express* authority from his clients to indorse any of said checks, aside from such authority as may have been vested in him by virtue of his employment. He failed to pay over

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to his clients all of the money due them and suit was brought against said bank. The United States Circuit Court of Appeals, for the Seventh Circuit, held that there could be no recovery against said bank, and in the course of the opinion said (pp. 727-729):

“The authority to collect and to receive from the executors the amount coming to the distributees included all the usual means of executing that authority with effect, * * * and all appropriate modes and reasonable modes are deemed to be within the scope of the authority conferred. * * * The authority is limited to the particular subject, but should be construed to effectuate the design and object. The authority of an attorney in the course of a litigation and in the prosecution and collection of claims has been often considered, but the courts have not at all times been at agreement. * * * There appears a tendency to relax the strict limitation of implied authority to meet the necessity of prompt action in modern business methods, particularly when client and attorney are at considerable distance from each other. After all, the question of authority must depend, as Mr. Mechem observes, largely upon circumstances; and ‘authority to do a given act carries with it the implied authority to do those things which are necessary in order to accomplish the main end, and what is necessary must be determined in many cases by reference to the particular facts.’ Mechem, Ag. sec. 816. In the case at bar, Fairman, the attorney for the legatees, alone was authorized to receive from the executors the amount coming to the distributees. It was also his duty to take only money in payment of the claims. * * * Fairman was authorized to collect this money, and for that purpose to execute these indorsements upon the checks. His clients were scattered, some of them in distant states. * * * The checks were not payment to him of that amount. They were but a convenient mode or means of remitting to him the money collected. * * * We do not mean to say that the implied authority of an attorney authorizes an indorsement of his client’s name in such way as to bind the

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client as an indorser, but that, under the circumstances of this case, Fairman was authorized to collect the money of his clients, and for that purpose to make these indorsements as a proper means to that end. The indorsement was availing to protect the drawer of the check, and that is sufficient.”

We think that the decision and the language of the opinion are particularly applicable to the facts of the present case. The judgment of the County Court is affirmed.

Affirmed.

Karl Puswaskis, Defendant in Error, v. Conrad Seipp Brewing Company and Math Kersting, Plaintiffs in Error.

Gen. No. 19,492. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed March 9, 1916.

Statement of the Case.

Action by Karl Puswaskis, plaintiff, against Conrad Seipp Brewing Company and Math Kersting, defendants, to recover \$750, alleged to be money had and received by defendants without consideration. From a verdict and judgment for \$641.67 in favor of defendant, the plaintiff brings error.

It appeared that Kersting executed a written lease of certain premises to Puswaskis to be used for saloon purposes, dated January 30, 1911, for a period from February 20, 1911 to April 30, 1916, at a rental of \$100 per month. Attached thereto, evidently as a

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part thereof, was a separate paper by which the lessee covenanted with the lessor to use in and about said premises only such draught beer as the lessor might designate, the price to be \$5 per barrel. On February 8, 1911, Kersting (who was manager of said brewing company), on the company's writing paper containing its letter head, wrote Puswaskis, and referring to the lease "between us" designated said company's beer as the beer to be used on the premises.

On March 1, 1911, he again wrote Puswaskis a letter which he signed as manager, in which he referred to said provision fixing the price of the beer and to a verbal understanding that it might vary with the revenue tax, and asked for confirmation of such understanding.

An arrangement for the lease was made on January 23, 1911. A memorandum of it, signed by Kersting and given to Puswaskis, is to the effect that the latter was to pay the former a bonus of \$500 for said lease, and that he then made a part payment of \$150 thereon, and would pay the balance in two instalments, which were subsequently paid to Kersting. That the said sum was to be paid as a "bonus," as stated therein, was corroborated by Kersting and another witness' account of the verbal conversation at the time said receipt or memorandum was given, against which interpretation there was Puswaskis' evidence that the money was to pay for "bonds."

MECHEM & BANGS, for plaintiffs in error.

FRANK P. MCGINN and **ROBERT D. MELICK**, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Navigato v. Melone et al., 198 Ill. App. 249.

Abstract of the Decision.

ASSUMPSIT, § 89*—*when evidence insufficient to establish joint liability of principal and agent.* In an action against a brewing company and its manager for money had and received by defendants without consideration, weight of evidence *held* to show that the money was paid to the brewing company's manager in accordance with a personal contract and to not establish joint liability of the brewing company and the manager.

William A. Navigato for use of Virgilio Cimino, Defendant in Error, v. Alessandro Melone and Angela Melone, Plaintiffs in Error.

Gen. No. 20,807. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed March 9, 1916.

Statement of the Case.

Garnishment proceedings by William A. Navigato, for the use of Virgilio Cimino, plaintiff, against Alessandro Melone and Angela Melone, defendants, based on indebtedness of five hundred dollars on the part of Navigato to Cimino, the usee, and an indebtedness of two hundred and fifty dollars for an unpaid real estate commission due from the Melones to Navigato. From a judgment for plaintiff, defendants bring error.

WILLIAM A. JENNINGS, for plaintiffs in error.

BROWN & NAVIGATO, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

F. M. Woodsmall Construction Co. v. Hall, 198 Ill. App. 250.

Abstract of the Decision.

ASSIGNMENTS, § 31*—*when assignee of part of partnership debt may sue alone as plaintiff in garnishment action.* Where a commission for the sale of real estate is due a partnership consisting of two persons, and one partner assigns his interest to the other the latter has the right to sue thereon in his own name in a garnishment action under the Practice Act, sec. 18 (J. & A. ¶ 8555), without joining his partner.

F. M. Woodsmall Construction Company, Defendant in Error, v. Dr. George F. Hall, Plaintiff in Error.

Gen. No. 21,085.

1. **MUNICIPAL COURT OF CHICAGO, § 14***—*when jury may not consider inconsistency of grounds of defense in affidavits of merits or defense.* Inconsistency of grounds of defense contained in affidavits of merits or defense filed in Municipal Court of Chicago is not a matter for the jury's consideration.

2. **MUNICIPAL COURT OF CHICAGO, § 14***—*when affidavits of merits or defense not admissible in evidence.* Affidavits of merits or defense filed in action in Chicago Municipal Court, two of which had been stricken, were not admissible in evidence before the jury in such action, to impeach the defendant who had filed them, on the theory that they were inconsistent and made in bad faith, and that defendant's testimony, which conflicted with plaintiff's, was on that account less reliable, nor were they admissible for any other purpose, but were calculated to be prejudicial to defendant in the weight the jury gave to material evidence.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed March 9, 1916.

WILLIAM GILLESPIE, for plaintiff in error.

MATHER & HUTSON, for defendant in error; WILLIAM A. SHEEHAN, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE BARNES delivered the opinion of the court.

This action was brought to recover the balance of the contract price for building a cement fence. The jury rendered a verdict in favor of plaintiff, the Construction Company, for \$802.50, and judgment was entered thereon.

Defendant Hall claimed and sought to show that the work was not done in a careful, workmanlike manner, and that there was faulty construction in laying a foundation of insufficient depth so that the frost cracked the cement.

There was direct conflict of evidence between plaintiff's president and defendant as to conversations had between them bearing on their arrangement and the liability of the cement to crack. The former said he told defendant that cement laid on a two-foot foundation, such as the plans used called for, was liable to crack, and defendant denied that he was so informed. Their evidence was somewhat conflicting on other points so that the jury's verdict may have been determined on the question of their respective credibility. On the points of difference the evidence was so close as to render it important that improper and prejudicial evidence calculated to affect such question should not have been received or should have been excluded. But evidence of that sort was admitted.

Defendant filed three affidavits of merits or defense. The first two had been stricken. The three were offered and received in evidence, but not on the theory that any one of them set up admissions against defendant's interests. In fact none did. Nor were they used, nor admissible in this case for use, in the usual way of impeachment. It is difficult to see, however, that they could have been considered for any other purpose. They were admitted on the theory of their "inconsistency," as stated by the court in the hearing of the jury, and while the record shows the court

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said it would instruct the jury thereon and no instructions are saved in the record, still as they were inadmissible, the instructions, whatever they were, could not cure the error of permitting them to go to the jury for any purpose. Inconsistency of pleadings is not a matter for the jury's consideration. Different grounds of defense were stated in the different affidavits. What influence they had on the jury cannot be determined. But the jury may have reasoned that the defenses in the different affidavits were, as the court intimated, inconsistent, and therefore made in bad faith, and hence that defendant's testimony was less reliable on that account. We can conceive of no other purpose of their introduction than to impeach defendant's credibility, or of any other significance a jury would attach to them. As they were admissible for no purpose and calculated to be prejudicial to defendant in the weight the jury gave to material evidence, there should be a new trial.

Reversed and remanded.

Lewis Rinaker and Gustav E. Beerly, Defendants in Error, v. American Bond & Mortgage Company, Plaintiff in Error.

Gen. No. 21,138. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 9, 1916.

Statement of the Case.

Intervening petition to enforce lien for attorney's fees of Lewis Rinaker and Gustav E. Beerly, attorneys at law, against the American Bond & Mortgage

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Company, which was defendant in a suit brought by Tiny Johnson, plaintiff. From an order directing the defendant to pay petitioners \$150, defendant brings error.

Petitioners were employed by one Tiny Johnson to prosecute a claim against the American Bond & Mortgage Company. One of them acting for his firm did considerable work to effect a settlement of the claim before bringing suit therefor. A suit was finally commenced in which his said firm and another firm (the attorneys for the American Bond & Mortgage Company in this appeal) appeared as attorneys of record. Most, if not all of the work connected with the litigation thereafter was conducted by the latter firm, resulting in a judgment against the American Bond & Mortgage Company for \$2,650.

After commencement of the suit and prior to the rendition of the judgment, the petitioners served notice in due form on such judgment debtor of their claim to an attorney's lien under the statute for the services they had performed and were to perform in the matter, and filed an intervening petition in said cause to enforce said lien. On the hearing thereof, the American Bond & Mortgage Company was ordered adjudged and directed to pay petitioners \$150.

There was evidence that the services rendered by petitioners were worth that sum. It was contended that the contract between petitioners and said Johnson called for an entire service, including prosecution of the suit, and that they abandoned the contract and thereby lost all right to compensation. This arose over the fact that the other legal firm was called in to aid defendants in error about the time the suit was commenced and conducted the trial without assistance from petitioners. Apparently the other firm was expected to conduct the trial, but it did not appear that petitioners did not perform all the services their client expected of them.

WILSON & MAY, for plaintiff in error,

Horvitz v. Shanfeld, 198 Ill. App. 254.

GUSTAV E. BEERLY, *pro se* and ROY S. GASKILL, for defendants in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

ATTORNEY AND CLIENT, § 138*—*when attorney entitled to lien for services.* Where attorneys at law filing an intervening petition to enforce lien for attorneys' fees were employed to prosecute a claim and did considerable work to effect a settlement of same, after which a suit, in which the petition was filed, was brought by other attorneys on such claim, and it did not appear that petitioners did not perform all the services their client expected of them, *held* that such services on account of such claim and cause of action were sufficient to give a lien, within the purview of the statute, in such action.

Jacob Horvitz, Defendant in Error, v. Nathan Shanfeld, Plaintiff in Error.

Gen. No. 21,174. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. *Affirmed.* Opinion filed March 9, 1916.

Statement of the Case.

Action of forcible detainer by Jacob Horvitz, plaintiff, against Nathan Shanfeld. The court directed a verdict for plaintiff and gave judgment for possession of the premises, from which defendant brings error.

The lease under which Nathan Shanfeld, the defendant, held the premises was in writing and under seal. The rent was payable monthly in advance and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

had been paid from time of entry until November, 1914. Defendant refusing to pay the rent for that month on demand therefor, a five days' notice was duly served, and on November 11th, a suit for forcible detainer was begun in the Municipal Court of Chicago, and on account of failure to pay the December rent on demand therefor, made December 14th, the suit at bar, without further notice, was begun December 16, 1914. After institution of and before judgment in the suit at bar, plaintiff took a nonsuit in the former. Defendant asked for dismissal of the latter suit because the former was pending when the suit at bar was begun.

At the trial the grounds of defense were (1) that defendant had not been given complete possession of the premises leased, he claiming that a room of the basement had been withheld from him and contained goods of the plaintiff which plaintiff on request had failed to remove; and (2) that when he paid the October rent plaintiff made a verbal agreement that he could stay and pay no more rent until plaintiff gave him possession of the basement. Defendant admitted that before the suit at bar was begun, plaintiff put a lock on the basement and left the key with him, which he refused to take because plaintiff had not removed said goods therefrom. There was also uncontradicted evidence that defendant refused to permit plaintiff's agent, sent there for that purpose, to remove the goods from such room.

WILLIAM L. MARTIN, for plaintiff in error.

BERNSTEIN, GROSSMAN & ZOLLA, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Horvitz v. Shanfeld, 198 Ill. App. 254.

Abstract of the Decision.

1. **ABATEMENT AND REVIVAL, § 48***—*when motion to dismiss because of pendency of prior action properly denied.* A motion in a suit of forcible detainer to dismiss same because of the pendency of a prior suit is properly denied, where the plaintiff after the institution of the second suit but before judgment took a nonsuit in the former suit.

2. **FORCIBLE ENTRY AND DETAINER, § 22***—*what constitutes sufficient possession.* Where defendant in action of forcible detainer contended that he had not been given complete possession of the premises leased because a room in the basement was withheld from him and contained goods of the plaintiff which plaintiff on request had failed to remove, held in view of delivery of key to such room by plaintiff to defendant and the refusal of defendant afterwards to permit plaintiff's agent to remove such goods, that the defense of want of possession was without foundation.

3. **LANDLORD AND TENANT, § 55***—*when oral agreement for non-payment of rent unenforceable.* In an action of forcible detainer of leased premises where defendant contended that plaintiff verbally agreed with him that he could stay and pay no more rent until plaintiff gave him possession of the basement, a room in which defendant contended, contrary to the evidence, was withheld from him, such agreement was *nudum pactum*, without consideration, and so long as the contract contained in the lease under seal remained executory, the plaintiff had the right to repudiate the parol agreement and claim the full amount of rent.

4. **TRIAL, § 191***—*when verdict properly directed.* There being no evidence that warrants a finding of the issues of fact for the defendant, no error in the rulings of the court and no complaint concerning instructions, a verdict for plaintiff is properly directed.

5. **FORCIBLE ENTRY AND DETAINER, § 31***—*when notice to quit not necessary as prerequisite to maintenance of action.* In an action of forcible detainer where the terms of the lease expressly waive notice and demand, a contention that the lease sued on was terminated by bringing a prior action of forcible detainer which was dismissed, and that the action at bar would not lie until after the statutory notice to quit, is not tenable, as no notice or demand is necessary.

6. **NEW TRIAL, § 81***—*when oral motion for new trial may be overruled without allowing additional time for presentation.* Overruling an oral motion for new trial at the close of the case without allowing additional time for its presentation deprived defendant of no right and was not an abuse of discretion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Augusta Albrecht et al., Plaintiffs in Error, v. Joseph Pinger et al., Defendants in Error.

Gen. No. 21,202. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 9, 1916.

Statement of the Case.

Action under Dramshop Act (Hurd's Rev. St., ch. 43, J. & A. ¶ 4600 *et seq.*), brought by Augusta Albrecht and others, plaintiffs, against Joseph Pinger, and others, defendants. From a judgment against them, plaintiffs bring error.

I. W. FOLTZ and WILLIAM C. DUNN, for plaintiffs in error.

DAY & GUENTHER, W. H. NELMS and F. P. DRENNAN, for defendants in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1186*—*when question of applicability of instructions will not be reviewed.* Under a record which consists of mere abstract questions of law and which contains neither evidence nor a certificate of the trial judge as to what it tended to prove, nor anything to determine the applicability of instructions complained of, the Appellate Court will not be justified in reviewing the case unless they can determine that the instructions are vicious under any and all circumstances.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Strassheim et al. v. Reuttinger, 198 Ill. App. 258.

Henry E. Strassheim and Adolph S. Boericke, trading as Henry E. Strassheim & Company, Defendants in Error, v. John C. Reuttinger, Plaintiff in Error.

Gen. No. 21,240. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and judgment here. Opinion filed March 9, 1916.

Statement of the Case.

Action by Henry E. Strassheim and Adolph S. Boericke, trading as Henry E. Strassheim & Company, plaintiffs, against John C. Reuttinger, defendant, for a commission of \$143.75 on account of furnishing a prospective purchaser with whom defendant entered into a written contract to sell a certain lot. From a judgment for plaintiffs, defendant brings error.

Against defendant's denial of an agreement to pay a commission was the testimony of plaintiff Strassheim and his clerk or agent, who began the negotiations, and the recognition in said written contract of the vendor's obligation to pay his broker a commission. Defendant fixed his price at \$3,750 and agreed to pay a commission of two and one-half per cent. thereon (\$93.75). Plaintiffs drew the contract and in it designated the purchase price as \$3,800 with a mutual understanding between plaintiffs and defendant that the excess of \$50 was to go to plaintiffs, though the purchaser supposed that \$3,800 was the actual purchase price. The contract provided for a deposit of \$200 with plaintiffs as earnest money to be retained by defendant as liquidated damages in case the purchaser failed to perform, and if retained was to be applied "first, to the payment of any expenses incurred for the vendor by his agent in said matter, and second to the payment

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of vendor's broker of a commission of \$143.75 for services in procuring this contract, rendering the overplus to the vendor." Because of the failure of defendant to furnish an abstract in accordance with the terms of the contract, the purchaser demanded of and received from plaintiffs the return of said earnest money.

EVERETT & MCGONIGLE, for plaintiff in error; JOHN C. EVERETT, of counsel.

WILLIAM G. WISE, for defendants in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 88***—*when evidence sufficient to sustain finding that vendor agreed to pay brokers a commission.* In an action for commission due plaintiffs, as real estate brokers, where it appeared that against defendant's denial of agreement to pay such commission there was testimony of plaintiff and his clerk or agent who began the negotiations, and a recognition in the contract of defendant to sell, on which the action was based, that the vendor was obliged to pay such broker a commission, evidence *held* sufficient to sustain a finding that defendant agreed to pay plaintiffs a commission.

2. **BROKERS, § 61***—*when liability of vendor not affected by deception of purchaser by brokers.* In an action by a real estate broker for his commission against the vendor of property where there was an agreement between the broker and vendor that, unknown to the purchaser, a certain sum out of the supposed purchase price was to go to such broker, the apparent deception of the purchaser does not affect the vendor's liability.

3. **BROKERS, § 66***—*when only entitled to additional commission.* Where a real estate broker is entitled to a certain sum in addition to his stipulated commission only in case the contract of sale is consummated and the entire purchase price paid, or in the event that a certain sum as earnest money is retained as liquidated damages under the terms of such contract of sale, and neither of such events happens, he is entitled to recover only such stipulated commission.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Greiner v. Pennsylvania Company, 198 Ill. App. 260.

**Alfred S. Greiner, Appellee, v. Pennsylvania Company,
Appellant.**

Gen. No. 21,278. (Not to be reported in full.)

Appeal to the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed with finding of fact. Opinion filed March 9, 1916. Rehearing denied March 21, 1916.

Statement of the Case.

Action by Alfred S. Greiner, plaintiff, against the Pennsylvania Company, defendant, on a claim for damages to plaintiff's automobile resulting from a collision with defendant's train at a public crossing in Indiana. From a judgment for \$900 in favor of plaintiff, defendant appeals.

Plaintiff charged negligence generally in operating the train, and specifically in disregarding his signal of danger and in maintaining a crossing of inadequate width.

Plaintiff at night was unable to move his automobile from defendant's tracks and detaching the tail light therefrom, which gave a dim red light, he ran westward along defendant's tracks towards the train which approached from the west at an estimated speed of from 50 to 60 miles an hour. The distance he had run when he waved the lamp at the train was disputed. The engineer, who could stop his train within about 1,000 feet, applied his emergency brakes and stopped the train with its rear end at a point estimated at from 50 to 250 feet beyond the crossing where it had struck plaintiff's automobile.

About 400 feet west of the crossing was a semaphore showing a white signal for a clear way, and pursuant to the company's rules the engine crew called the signal "white" to each other when they saw it. About

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800 or 900 feet west of the crossing was a whistling post where the whistle was given for the crossing. Both the engineer and fireman testified that they did not see plaintiff until just before he stepped from in front of the train, which plaintiff said was when it was 30 feet away; that they were then about 500 or 600 feet from the crossing. Plaintiff estimated the distance at 1,200 feet, and one of his witnesses judged it was "in the neighborhood of 1,000 feet or a quarter of a mile," and the other at "about a quarter of a mile" but admitted that he "did not see how anybody could judge the distance at night to an accurate point."

LOESCH, SCOFIELD & LOESCH, for appellant.

FREDERIC R. DE YOUNG and WILEY W. MILLS, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 3*—*when evidence of driver of automobile insufficient to establish distance from automobile to point where train was signaled.* In an action for damages for injury caused by defendant's train to plaintiff's automobile, where plaintiff alleges that defendant disregarded his stop signal and the burden rested upon him of fixing the distance he had advanced along defendant's tracks when he gave such stop signal, and his estimate was formed under circumstances of excitement and concern, in the nighttime, with no fixed objects at definite distances for comparison, and this estimate was contradicted by equally credible evidence given by persons shown to be more familiar with the location and whose daily occupation required them to exercise knowledge of distances, *held* that plaintiff's estimate did not afford a sound basis upon which to base a verdict.

2. AUTOMOBILES AND GARAGES, § 3*—*when evidence insufficient to establish negligence in failing to stop train so as to prevent collision with automobile.* In an action for damages for injury to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff's automobile caused by defendant's train at a crossing, where it appeared that the train could be stopped at a distance of about 1,000 feet; that it was dark at time of the accident; that the speed of the train was about a mile a minute; that the railroad signal in the vicinity was set for a clear way; that plaintiff's lamp with which he endeavored to signal gave dim light which might have been passed unobserved while defendant's servants were watching for block signals; that distances in question are mere estimates, a slight variation from which would change the entire ground for a charge of negligence, provided brakes were promptly applied, *held* that a finding of negligence of defendant was contrary to the weight of the evidence.

J. R. Newport and Earl L. Cook, trading as J. R. Newport Lumber Company, Appellees, v. John J. McPherson and Ralph T. McPherson, trading as McPherson Brothers, and J. O. Nessen Lumber Company (Garnishee), Appellants.

Gen. No. 21,296.

1. APPEAL AND ERROR, § 1343*—*when it will be presumed that shortest time allowed by statute to file appeal bond was given.* Where no time is specified within which to file an appeal bond, it is assumed that the time given was twenty days, the shortest time allowed by the statute.

2. APPEAL AND ERROR, § 671*—*when basis for order nunc pro tunc allowing filing of appeal bond does not exist.* Where on February 16th, twenty-nine days after allowing the appeal, the court on motion of defendant entered an order *nunc pro tunc* allowing forty days from January 18th in which to file the bond, and the order does not appear to have been made to supply any omission from the record, where the court does not on such later date actually make an order of that character that the clerk omits to enter, there is no basis for an order *nunc pro tunc*.

3. APPEAL AND ERROR, § 723*—*when record must show authority to enter order nunc pro tunc allowing filing of appeal bond.* Facts supporting authority to enter an order *nunc pro tunc*, allowing the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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filing of an appeal bond within forty days, must affirmatively appear of record.

4. APPEAL AND ERROR, § 671*—*when trial court no jurisdiction to extend time for filing bond.* Where the time for filing an appeal bond expires on a certain date, the court has no jurisdiction thereafter, even within the thirty days it retained control over the judgment, to extend the time for filing the bond by a *nunc pro tunc* order.

5. APPEAL AND ERROR, § 667*—*when appeal is not perfected because of defective appeal bond.* Even though an appeal bond is filed within the period designated, if it is not approved as shown by the indorsement of the judge until after such period has expired, there is a failure to perfect the appeal.

6. APPEAL AND ERROR, § 13*—*when right of appeal exists.* The statute granting right to appeal must be strictly complied with, and it manifestly contemplates the approval of the bond before it is filed within the period allowed by the court for such filing.

7. APPEAL AND ERROR, § 667*—*when signature of judge to appeal bond must be affixed.* The procedure with regard to the period during which an appeal bond is filed is not analogous to that which justifies the judge's retention of a bill of exceptions after the period for filing the same before affixing his signature.

Appeal from the Municipal Court of Chicago; the Hon. JOHN STELK, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Appeal dismissed. Opinion filed March 9, 1916. Rehearing denied March 29, 1916.

ADAMS, CREWS, BOBB & WESCOTT, for appellants.

SOBOBOFF & NEWMAN, for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

Motion is made by appellees to dismiss the appeal herein, which was prayed and allowed January 18, 1915, from a judgment of the Municipal Court of Chicago rendered the same day. No time was specified within which to file the appeal bond. In such a case it is assumed that the time given was twenty days, the shortest time allowed by the statute. (*Bairstow v. New York Life Ins. Co.*, 148 Ill. App. 186.)

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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On February 16th, twenty-nine days after allowing the appeal, the court on appellants' motion entered an order *nunc pro tunc* allowing forty days from January 18th, in which to file the bond. The order does not appear to have been made to supply any omission from the record. If the court did not on January 18th actually make an order of that character that the clerk omitted to enter, there was no basis for an order *nunc pro tunc* (*Lindauer v. Pease*, 192 Ill. 457), and facts supporting authority to enter such an order must affirmatively appear of record. (*People v. Rosenwald*, 266 Ill. 548.) As, therefore, the time for filing the bond expired twenty days after January 18th, viz., on February 7th, the court had no jurisdiction thereafter, even within the thirty days it retained control over the judgment (*Grubb v. Milan*, 249 Ill. 456), to extend the time for filing the bond. This was settled beyond all question in *Hill v. City of Chicago*, 218 Ill. 178.

But, even if the court had not lost jurisdiction to enter the order of February 16th, and even though the bond was filed February 27th, the last day of the period fixed thereby, still as the bond was not approved (as shown by the indorsement of the judge thereon) until February 28th, forty-one days after January 18th, there was a failure to perfect the appeal, which required the approval as well as the filing of the bond within the time allowed therefor. (*Phoenix Ins. Co. v. Hedrick*, 69 Ill. App. 184.) The statute granting the right of appeal must be strictly complied with (*Hill v. City of Chicago, supra*), and it manifestly contemplates what, so far as we have knowledge, has always been the practice, the approval of the bond before it is filed; and the procedure with regard thereto is not as appellants contend analogous to that which justifies the judge's retention of a bill of exceptions after the period for filing the same before affixing his signature. The appeal will be dismissed.

Appeal dismissed.

OPINION ON APPLICATION FOR REHEARING.

MR. JUSTICE BARNES: Since entering the order dismissing this appeal appellants have filed a corrected transcript of record showing the bond was approved on February 27th instead of February 28th, and have asked for a rehearing. While that part of our opinion as to the approval of the bond has no application to the record as corrected, that part of it relating to the want of power to extend the time for filing the bond was controlling of the question, and finding no occasion for changing our views the petition for a rehearing will be denied.

Rehearing denied.

Lydia E. Defrees et al., Appellees, v. Robert T. Brydon,
Administrator, Appellant.

Gen. No. 20,938.

1. WILLS, § 229*—*when revoked provisions of will considered for purpose of ascertaining intention of testator.* Provisions of will although revoked by item in codicil will be regarded for the purpose of determining the intention of the testator.

2. WILLS, § 398*—*what constitutes an executory devise or bequest.* An executory devise or bequest of lands or personal property is such a disposition of them by will that thereby no estate vests at the death of the deviser, but only on some future contingency.

3. WILLS, § 398*—*when will does not provide for executory devise or bequest.* No executory devise or bequest is intended by the testator where provisions for his children made by the testator in the will are limited to take effect before his death and are evidently intended as provisions against the intestacy, with reference to property devised in such will, of his children who might die before he did.

*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

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4. WILLS, § 230*—*when words in different parts of will harmoniously construed.* Courts will not construe the same words used in different parts of the will as having different meanings, if it is possible to do so, but the intention to use the same words in different senses must be clear and beyond question.

5. WILLS, § 229*—*when words in codicil construed in harmony with words in will.* Where it appears to be the intention of a testator, as between heirs by blood and the estate of a deceased heir without issue, to create executory devises and bequests by provisions in the codicil of his will, which provisions are disputed, and the provisions in such codicil are similar to provisions in the will which show intention to vest such heirs with the fee, and such provisions in the codicil were evidently intended to provide against intestacy during the existence of the trust created by his will and not as a limitation on the fee, the court will construe such provisions to intend his heirs to have an absolute fee in the property devised, on the principle that the same words in different parts of the same will, if possible, ought to be construed to have the same meaning.

6. WILLS, § 339*—*when construed to give fee simple to heir.* Instructions in will permitting trustees of the property devised to terminate trust as to any of testator's children and to pay over such child's share to it, give such child the power to alienate its property after the termination of the trust, and evidence an intention to give an absolute fee to such children.

7. WILLS, § 226*—*when intention of testator will be given effect.* Courts will give effect to the intention of the testator unless it violates some established rule of law.

8. WILLS, § 234*—*when should be construed to avoid intestacy.* A will should be construed so as to avoid intestacy, if possible, as to any of testator's property.

9. WILLS, § 229*—*when codicil and will should be harmoniously construed.* The provisions of a codicil and the will should be construed so as to harmonize them with each other as far as possible.

10. WILLS, § 283*—*when not construed as excluding son-in-law from inheritance.* A clause in a will providing that no daughter of testator with her husband shall so occupy or control the use of the homestead as to exclude therefrom or prejudice any unmarried child of such testator, does not show intention to exclude his son-in-law from inheritance of the property.

11. WILLS, § 283*—*when provision excluding son-in-law from inheritance of property except with consent of trustees limited to period of trust.* A clause in a will providing that no part of fund in trust for testator's daughters "shall pass to or be paid to her husband, or in any way be controlled by such husband, except by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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consent of said trustees," and provision in codicil that interest held in trust for each of his daughters is given and intended "to be her sole and separate estate, and shall not pass to * * * her husband, except by the consent of her trustees," held in connection with other provisions of the will, to limit the prohibition only to the time of continuance of the trust as against the surviving husband of one of such daughters.

12. WILLS, § 283*—*when provision of will not construed as excluding husband of heir from participating in heir's legacy only during period of trust.* Where a provision in the first codicil of a will provided that any of testator's children might, by will, give or bequeath his or her share of testator's estate to any other child or lineal descendant of testator's, or of testator's deceased wife, giving it only to persons of testator's or testators' wife's blood and the last clause in second codicil provided that in case any of the *cestuis que trust* should die during the existence of the trust in said will and the codicil specified and should not have disposed of his or her trust estate by will, and said trust interest should pass to his or her heirs by inheritance as provided, but it should remain in the hands of said trustees, but thereafter for the benefit of the inheritor, *held*, that the limitations to convey by will only to persons of the blood ceased with the termination of the trust, and were evidently provisions against intestacy during the existence of the trust and were not intended to exclude husband of one of testator's daughters from her legacy.

13. WILLS, § 331*—*what constitutes violation of rule against perpetuities.* A provision in codicil that if any of testator's children "shall die leaving issue, and such issue shall die childless, then in that case all property derived from me shall go to my other children and their heirs, such heirs to have only their ancestor's part in any case," if construed to intend the creation of executory devises or bequests so that property should revert to surviving children of the testator, such construction would be contrary to the rule against perpetuities.

14. WILLS, § 235*—*when construction adopted which will give effect to meaning of words.* If one construction of a will renders a portion of the language used meaning less and another gives effect to all the words used, the latter must be adopted.

15. WILLS, § 224*—*when construction of will and codicil as to disposition of personalty governed by laws of foreign State.* Where a testator was domiciled and died in a foreign State, and the will and codicils were drawn in such State, the construction and effect thereof, as affecting personal property, must be governed by the law of that State.

16. WILLS, § 339*—*when will construed as creating an estate in fee.* Where an item of a codicil to a will made in the State of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Indiana and relating to personal property authorizes trustees to use as much of the trust property as might become necessary, for the benefit of testator's children, the rule in Indiana, the law of which governs construction of the will and its codicils, is that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void, and such will and codicils will not be construed to give the first takers an estate for life only so as to bring it within the exception to the foregoing rule whereby, if a testator gives an estate for life only, by certain and express terms, and annexes to it the power of disposition, the devisee in that special case would not take an estate in fee.

17. **WILLS, § 336***—*when estate in fee created by disposing words.* Testator having used the disposing words, "to her or him, or her or his heirs forever," clearly to confer complete and absolute title, such interest or estate cannot be held to be subject to limitations over, where the provisions alleged to create such limitations are not so clear and decisive as the words expressing the dominant purpose to give absolute title.

18. **PARTITION, § 2***—*when representative of heir participating in partition settlement bound by such settlement.* The estate of a deceased legatee should not be held, in an action to construe a will, to revert to the surviving children of testator or their personal representatives, where all of testator's children, except one whose property was retained by trustees under the will and the trustees of testator's estate, filed a petition in the courts of the State in which the personalty was located in which they represented that they had agreed upon a division of such property, and that such division as therein set forth should be taken and held as a full settlement, partition and adjustment of all the property mentioned, and where each child, by order of such court, received an equal amount of cash and securities as a full settlement and adjustment of such child's right and interest in the trust estate, and no fraud is claimed, and the surviving children of the testator were parties to said proceeding by apt designation for all the purposes essential to determine their respective rights and interests, and only one of the parties to the settlement is now living, and more than forty years have elapsed since it was made, and it is denied by defendant that the property coming to him as personal representative of such deceased legatee is the property derived by her from such settlement.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed March 9, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement by the Court. This is a proceeding brought by Lydia E. Defrees, one of the appellees, to construe the will of John H. Bradley, deceased, and for an accounting from the estate of Catherine S. Brydon, deceased, of property which she received from the estate of the testator, her father.

On or about February 18, 1869, John H. Bradley, while domiciled in the City of Indianapolis, Indiana, made and executed (a) a will, (b) on April 22, 1870, a codicil thereto, and (c) on June 7, 1871, a second codicil thereto. On August 12, 1872, he died, and the said will and codicils were probated, and his estate administered in the Court of Common Pleas of Marion county, Indiana.

John H. Bradley left him surviving, the five children mentioned in his said will and codicils, viz., Lydia E. Defrees (the complainant), Frances B. Hill (John F. Devine, as administrator of her estate, cross-complainant), Mary Bradley Kitchen (John B. Kitchen as administrator of her estate, cross-complainant), Emmor Bradley (who died before Catherine S. Brydon, without issue), and Catherine S. Brydon (Robert T. Brydon, her husband, as administrator of her estate, defendant).

On October 23, 1872, the five children of the testator filed a certain petition in the Court of Common Pleas of Marion county, Indiana, in which the said children, as the heirs and devisees of the testator, and the said trustees represented that they had agreed upon a division of said property, real and personal, and that such division, as therein set forth, be taken and held as a full settlement, partition and adjustment of all the property, real and personal, mentioned or intended to be mentioned, therein. Under this petition, by order of the court, each child received and receipted for \$18,150, in cash and securities, except Emmor, whose property was retained by the trustees.

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On May 15, 1910, Catherine S. Brydon departed this life intestate, without issue, and Robert T. Brydon, her husband was appointed administrator of her estate, consisting wholly of personalty, which amounted in value to \$21,146.51.

The court below held that the testator intended to and did create executory devises or bequests by the provisions in item sixth of the will and item tenth of the first codicil thereto, and that upon the death of Catherine S. Brydon, intestate and without leaving issue, all of the said property bequeathed to and recovered by her should revert to the surviving children of the testator, and, therefore, that the complainant and cross-complainants (appellees) are entitled to an accounting against the estate of Catherine S. Brydon, deceased, to the extent of \$18,150, and that said amount be adjudged and allowed to them against the estate of Catherine S. Brydon, deceased, and against Robert T. Brydon, as administrator thereof, to be paid by the said estate and such administrator thereof, in due course of administration, and that the interest of each appellee is one-third of the total amount of said claim.

JOHN E. FOSTER, for appellant.

FYFFE, RYNER & DALE and WILLIAM FRANCE ANDERSON, for appellees; COLIN C. H. FYFFE, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

The questions before this court for decision are:

1. Did the testator intend to create, and did he create executory devises or bequests by the disputed provisions in item tenth of the first codicil to the will of the testator?
2. Did the property of Catherine S. Brydon pass, upon her death, to her personal representative?
3. Did the settlement entered into by the children

of the testator terminate the right of each of them in any property received by the other under such settlement?

By item tenth of the first codicil to the will, the devise was directed to the trustees in fee with full power and authority to manage the trust estate and invest the funds thereof for the sole use, ownership and benefit of the testator's children. The fee of such trust estate could not vest in the children until the termination of the trust. The disposing words are, “* * * when the fund shall be divided by said trustees * * * (each child) to have the one-fifth part of the principal thereof, *to her or him* or her or his heirs forever.” The provisions of item tenth of the first codicil (the construction of which are in dispute) are as follows:

“If any of said children shall die before I do, or afterwards, without leaving issue, such deceased child's share shall go, and is hereby bequeathed to my surviving children and their heirs equally. In all cases the child or children, of any of my children who may die, shall take his or her deceased parent's share only. If any of my above named children shall die leaving issue, and such issue shall die childless, then in that case all property derived from me shall go to my other children and their heirs, such heirs to have only their ancestor's part in any case.”

It is contended by appellant that the foregoing limitations upon the rights of the children, continued only during the existence of the trust, are provisions against intestacy, and did not create executory bequests. Upon the other hand, appellees contend that the words “*before I die, or afterwards*” clearly manifests the intention of the testator to create executory bequests.

It is a recognized rule of construction that the revoked provisions of a will may be regarded for the purpose of determining the intention of the testator. Item sixth of the will, revoked by item tenth of the first codicil, contains the following:

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“If any one of my said children shall die without leaving a child or children, before I do, then such child’s share shall be equally divided among my surviving children, and the children of any one dead, leaving issue. In all cases, if any of my said five children shall die, leaving a child or children, such child or children, shall take their, or his or her deceased parents’ part only.

“If any of my said children shall die leaving issue, and such issue shall die childless, then in that case all estate and property derived from me shall go to and belong to my other children, or to their heirs.”

“An executory devise of lands (and this applies also to an executory bequest of personal property) is such a disposition of them by will, that thereby no estate vests at the death of the deviser, but only on some future contingency.” (Wendell’s Bl. Com., vol. 2, 172.) No executory devise or bequest was intended by the testator to be created by item sixth, because said provisions were limited to take effect before his death and were evidently intended as provisions against the intestacy of any of his property devised to his children who might die before he did. Courts will not construe the same words used in different parts of the will as having different meanings, if it is possible to avoid doing so. The intention to use the same words in different senses must be clear and beyond question. *Madison v. Larmon*, 170 Ill. 65, 73; *State Bank v. Ewing*, 17 Ind. 68.

The disputed provisions in item tenth of the first codicil are similar to the above quoted provisions in item sixth of the will, except as to the words “or afterwards” in the clause “if any of said children shall die before I do, or afterwards,” and were evidently intended by the testator to provide against intestacy, during the existence of the trust, and not as a limitation on the fee which would vest in the child as soon as the trust should terminate as to his or her share,

unless a contrary intention is shown by other provisions in the will and codicils.

The testator's intention to give to his children an absolute fee in the property devised, is further evidenced by the following directions to the trustees in item tenth of the first codicil:

“And I do hereby will, order and direct, that said trust in each case, and as to any one of said children, may be terminated, and the share of such child and its increase paid over to such child, whenever it will be for the advantage of such child; of which fact the said trustees shall be the sole judges—and have the power of a parent to decide, and which they may decide, to do so; but I desire that they do not do so, except in a very strong, clear case of its propriety, and not in any case to enable such child to invest his or her money in speculation.”

The foregoing manifestly gives the children the power, necessarily implied, to alienate the property after the termination of the trust, unless, by some other provision, a contrary intention of the testator is shown. The courts will give effect to the intention of the testator, unless it violates some established rule of law, and a will should be construed so as to avoid intestacy, if possible, as to any of his property. The will and codicils must be read together as one instrument, and so far as practicable must be reconciled or harmonized together as one consistent whole. 40 Cyc. 1421.

It is urged by appellees that it was the intention of the testator to give his property wholly to persons of his or of his wife's blood, and not to his sons-in-law, or other aliens of the blood. Item fifth of the will provides that no daughter with her husband shall so occupy or control the use of the homestead as to exclude therefrom or prejudice any unmarried child. This provision only prohibits the exclusive use and enjoyment of the homestead by the husband of any daughter of

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the testator. Appellees refer to item seventh of the will wherein it is provided that, "If my daughters or either of them marry, none of said *trust fund* shall pass to or be paid to her husband, or in any way be controlled by such husband, *except by consent of said trustees,*" and a somewhat similar provision in item tenth of the first codicil, "The estate or interest, hereby given to each of my daughters, and held by said trustees in trust for them, is given and intended to be her sole, and separate estate, and shall not pass to or be paid to, or be in any way controlled by, her husband, except by the consent of the said trustees, and such daughter, his wife; and this to apply to principal and increase both." Wherever in the will and codicils a similar provision occurs, the testator has expressly limited such provision to the time of the continuance of the trust. Immediately following the disputed provisions in item tenth is the following:

"Any of my said five children and every one of them, may as he or she pleases, *by will*, give and bequeath his or her share of my estate to any other child or lineal descendant of mine, or of my deceased wife, *giving it only to persons of my or her blood.*"

The last item of the second codicil provides:

"Item:—In case any of the *cestui qui trusts* shall die, *during the existence of the trust*, in my said will and the codicil specified, *and shall not have disposed of his or her trust estate by will, and said trust interest shall pass to his or her heirs by inheritance as provided;* but it and all its increase shall still remain in said trust, in the hands of said trustees, but thereafter for the benefit of the inheritor."

The foregoing are the only provisions where a power of disposition, of any of the property of the testator, by will, has been given. The limitations upon the children to convey by will only to persons of the blood ceased with the termination of the trust, and are evidently provisions against intestacy during the existence of the trust.

Under the construction given by appellees to the will and codicils, the third disputed provision in the tenth item of the first codicil is contrary to the rule against perpetuities, said provision being as follows:

“If any of my above named children shall die leaving issue, and such issue shall die childless, then in that case all property derived from me shall go to my other children and their heirs, such heirs to have only their ancestor’s part in any case.”

The rule against perpetuities is that “No future interest in property shall be created which must not necessarily vest within twenty-one years, exclusive of periods of gestation, after lives in being.” 30 Cyc. 1467.

It is a familiar rule of construction that in ascertaining the intention of a testator, effect must be given to all the language used, if it can be done. If one construction will render a portion of the language used meaningless and another will give effect to all the words used, the latter construction must be adopted. *Fisher v. Fairbank*, 188 Ill. 187, 191; *Brumfield v. Drock*, 101 Ind. 190, 196. If said third disputed provision be construed as providing against intestacy, and therefore limited in operation to the existence of the trust, it does not violate any rule of construction.

If, however, the disputed provisions in item tenth of the first codicil are to be regarded as indicating an intention on the part of the testator to create executory devises or executory bequests, are such limitations over valid?

The testator having been domiciled in Indiana where the will and codicils were drawn and executed, and having died there, their construction and effect as to the property involved (personalty) must be governed by the law of that State. Under item ten of the first codicil the first takers, the trustees, were authorized to use so much or all of the trust property as might become necessary for the benefit of the children of the testator. In Indiana, the rule in such cases is that an

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absolute power of sale in the first taker renders a subsequent limitation over repugnant and void. *O'Boyle v. Thomas*, 116 Ind. 243; *Essick v. Caple*, 131 Ind. 207; *Stimson v. Rountree*, 168 Ind. 169.

The only exception, in Indiana, to this rule is where the testator gives to the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. *Mulvane v. Rude*, 146 Ind. 476, 483. The will and codicils in the instant case manifestly do not, by certain and express terms, give to the first takers an estate for life only.

It is also a familiar principle that when an interest or estate has been given in clear terms in one clause of a will, such interest or estate cannot be taken away or cut down by a subsequent clause which is not equally clear and decisive of the testator's intention. *Myers v. Carney*, 171 Ind. 379, 384. We are of the opinion that the disputed provisions which appellees contend create a limitation over, are not as clear and decisive as the disposing words "to her or him, or her or his heirs forever." Having intentionally clothed the objects of his bounty with a complete and absolute title, the testator could not preserve that dominant purpose and at the same time subjoin incompatible provisions. *Stimson v. Rountree, supra*.

We are unable to agree with appellees' contention that the Indiana cases holding that when property is given absolutely with a gift over of *whatever may remain* by the first taker at his death, are distinguishable from the instant case, because of the express authority and power given in the instant case to the trustees, with the consent of the children, to decrease the *corpus* of the trust estate. A gift over in the instant case would necessarily be of "whatever may remain" by the first taker at his death.

We are of the opinion and therefore hold that the bequests and devises to the children of the testator were absolute and gave to them the entire estate without any limitations, and that upon the death of Catherine S. Brydon her property passed to her personal representative.

There is a further reason why the estate of Catherine S. Brydon should not revert to the surviving children of the testator, or their personal representatives. All of testator's surviving children, except Emmor, now deceased, and whose property was retained by the trustees, filed on October 23, 1872, a certain petition in the Court of Common Pleas of Marion county, Indiana, in which the said children, as the heirs and devisees of the testator, and the said trustees represented to the court that they had agreed upon a division of said property, real and personal, and that such division, as therein set forth, be taken and held as a full settlement, partition and adjustment of all the property, real and personal, mentioned or intended to be mentioned therein. Under this petition, by order of the court, each child received in cash and securities \$18,150, as a full settlement and adjustment of such child's rights and interests in the trust estate. No fraud is claimed by appellees. Family settlements are favorably regarded by courts of equity and will be upheld where no fraud is shown. *McAdams v. Bailey*, 169 Ind. 518.

The surviving children of the testator were parties to said proceeding by apt designation for all the purposes essential to determine their respective rights and interests (*Boyd v. Robinson*, 93 Tenn. 1, 28), as the "children, heirs, and devisees of John H. Bradley." We see no reason why this agreement should not have the force and effect its terms indicate, even if the parties thereto were possessed of future interests in said trust estate, which we do not hold. *Eissler v. Hoppel*, 158 Ind. 82, 85.

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When it is considered that only one of the parties to the settlement is now living, that more than forty years have elapsed since such settlement was made, that no fraud or mistake is claimed to have entered into same, and that the surviving husband of Catherine S. Brydon, appellant here, denies in his answer that the property derived by his deceased wife through such settlement is the property of which she died possessed, a court of equity should not be inclined to hold that by such settlement all future rights, if any then existed, together with the then present interests of the parties, were not concluded and determined. We therefore hold that such settlement concludes the appellees in this proceeding.

For the reasons stated the decree is reversed, and the cause remanded with directions to dismiss (a) the bill, and amended and supplemental bill of complaint of Lydia E. Defrees, and (b) the respective cross-bills of complaint of John F. Devine, as administrator of the estate of Frances B. Hill, deceased, and of John B. Kitchen, as administrator of the estate of Mary Bradley Kitchen, deceased, appellees, for want of equity.

Reversed and remanded with directions.

**Lydia E. Defrees et al., Appellees, v. Robert T. Brydon,
Appellant.**

Gen. No. 20,939. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed March 9, 1916.

Statement of the Case.

Bill by Lydia Defrees *et al.*, complainants, against Robert T. Brydon, defendant. From a judgment for complainants, defendant appeals.

This case is governed by the opinion in *Defrees v. Brydon, ante*, p. 265, and the decree is accordingly reversed and the cause remanded with directions to dismiss the bill and amended and supplemental bill of complainant for want of equity.

JOHN E. FOSTER, for appellant.

FYFFE, RYNER & DALE and WILLIAM FRANCE ANDERSON, for appellees; COLIN C. H. FYFFE, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Gundlach Adv. Co. v. W. F. Hallam & Co. et al., 198 Ill. App. 280.

Gundlach Advertising Company, Appellees, v. W. F. Hallam & Company and W. F. Hallam, Appellant.

Gen. No. 20,806. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed March 15, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action on a promissory note for \$2,000 by Gundlach Advertising Company, plaintiff, against W. F. Hallam & Company and W. F. Hallam, defendants. From a judgment in favor of plaintiff for \$2,000, defendants appeal.

W. F. Hallam & Company, of which W. F. Hallam is president, was a Florida corporation engaged in the business of building, contracting, and in the sale of Florida lands. Some time prior to January 19, 1912, B. J. Bussiere, president of the Classified Ad Company, an advertising corporation having its principal office in Chicago, Illinois, visited W. F. Hallam at Lakeland, Florida, to solicit advertising for his company. In the negotiations between these two men it was represented that the Classified Ad Company was financially responsible and that if permitted to conduct an advertising campaign for the Hallam Company, the result would prove of great value to its business. In these discussions it appeared that the Hallam Company would not be able to pay in cash the amount of money required to conduct this campaign, if entered into, and the plan of giving notes for part of this money was discussed, and in the course thereof it was made known that the Classified Ad Company would undertake to negotiate these notes through one Benjamin E. Page, of Chicago. As a result a proposition for this advertising campaign was submitted to the Hallam

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Company by the Classified Ad Company, in a letter dated January 19, 1912, addressed to W. F. Hallam & Company, Lakeland, Florida, signed by the Classified Ad Company, per B. J. Bussiere, president. The Hallam Company signified its acceptance thereto by stating in said letter that the proposition contained therein was fully and irrevocably accepted. This letter was submitted in person by Bussiere to the Hallam Company, and all the signatures affixed to said paper and the indorsements thereon were made at Lakeland, Florida, on January 19, 1912. Said proposition provided that in consideration of the Hallam Company placing with the Classified Ad Company an advertising appropriation of \$12,000, the Classified Ad Company agreed to furnish in a thorough, business like, competent manner, advertising in the best available and most valuable mediums. The Classified Ad Company was to establish and maintain a well-equipped correspondence office in Chicago to advance the interests of the Hallam Company in connection with the advertising campaign, and to place in charge thereof a competent correspondent as manager, the expense of which, viz., \$1,000, was to be paid by the Hallam Company. The Classified Ad Company was further to prepare the literature required for the successful prosecution of the advertising campaign and to supervise the publication of all such literature, the appropriation therefor (\$2,000) also to be paid by the Hallam Company. The Classified Ad Company further agreed to submit proofs of each piece of literature for final approval. The compensation to be received by the Classified Ad Company for its services in conducting this advertising campaign was to be a commission of three and one-half per cent. of the gross receipts resulting from the advertising campaign, either directly or indirectly.

In a separate letter of the same date, the Classified Ad Company guarantied that the Hallam Company

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would receive and do \$150,000 worth of business as a result of the advertising appropriation of \$12,000. It also guarantied to supervise the literature expenditure of \$2,000 and the Chicago office expenditure of \$1,000. This guaranty provided that if the Hallam Company should fail to receive \$150,000 worth of business within one year from the date of entering into the agreement aforesaid, the Classified Ad Company would refund seventy-five per cent. of the total charge for said service.

In accordance with the agreements entered into on this date, the Hallam Company gave to the Classified Ad Company in full payment of moneys needed in the campaign, including the expenditures, \$6,000 in certificates of deposit, and \$9,000 in the form of notes. The note sued on was one of these notes and was for the sum of \$2,000 payable on October 19, 1912. This note, as well as other notes, was dated January 19, 1912, payable to W. F. Hallam & Company, at the First National Bank of Lakeland, Florida, with interest from maturity at the rate of ten per cent. per annum. They were signed by W. F. Hallam & Company per W. F. Hallam, and indorsed by W. F. Hallam & Company and by W. F. Hallam individually.

This note came into the possession of E. T. Gundlach about September 20 or 21, 1912. It was due October 19, 1912. Before its maturity it was taken over by the plaintiff company and Mr. Gundlach given credit therefor on the books of the company. It was not paid at maturity and thereupon suit was instituted against the Hallam Company and Mr. Hallam personally, by the plaintiff company, in which the judgment was entered from which this appeal has been prosecuted.

The statement of claim showed that it was a suit based upon a promissory note. Defendants, in their affidavit of merits, alleged:

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First, That the Gundlach Advertising Company had not bought and does not now own the note here sued on; second, that the plaintiff at the time of the pretended assignment to it of said note had notice that the consideration for said note had failed and that there were good and sufficient defenses to said note as between the Classified Ad Company and Benjamin E. Page on the one side, and defendants on the other; third, that at the time of the pretended purchase of the note, the Gundlach Advertising Company and its officers and agents had such knowledge of the facts and circumstances surrounding the giving of this note and its want of consideration as to taint the entire transaction with fraud and to make the purchasing of said instrument by the Gundlach Company an act in bad faith; fourth, that at the time of the pretended purchase of the note by the Gundlach Company, no payment was ever made thereon; that before any payment was made thereon, if any payment was ever made, the Gundlach Company, and its officers and agents had become aware of the defense claimed by defendants and that the consideration for such note had failed, that the note had been secured from defendants by fraudulent practices, and had knowledge of such other facts and circumstances as to make the purchase of the note amount to an act of bad faith.

On the trial plaintiff, upon offering in evidence the note and testimony that it was unpaid, rested. The evidence on behalf of defendants showed a breach of the covenants entered into by the Classified Ad Company in consideration of which the note in question, among others, was executed and delivered; that there had been a breach of faith in the negotiation of these notes on the part of the Classified Ad Company and that the title of the said Classified Ad Company to said instrument was defective.

JOHN W. CREEKMUR and ROBERT G. DREFFEIN, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & STEERE, for appellee.

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MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 446***—*when evidence sufficient to sustain finding that title of payee to notes was defective and breach of faith in transfer.* In an action on a promissory note, evidence held to show a breach of covenants by the payee of note sued on, in consideration of which covenants the note, among others, had been given, and a breach of faith in the negotiation of the note on the part of such payee and that title of payee to said instrument was defective.

2. **BILLS AND NOTES, § 411***—*when burden of proof on holder of note to show that it or previous holder was holder in due course.* In a suit by the holder of a note against the maker and an indorser where defendant, under his affidavit of merits, showed breach of covenants on part of prior holder of the note, in consideration of which covenants the note had been given, a breach of faith by such prior holder in their negotiation and that the title of such prior holder to the note was defective, the burden was then on plaintiff, under section 59 of the Negotiable Instrument's Act, Hurd's Rev. St., ch. 98, sec. 77 (J. & A. ¶ 7698) to prove that it, or some holder from whom it derived its title, was a holder in due course.

3. **BILLS AND NOTES, § 460***—*when question whether plaintiff holder in due course for jury.* Whether or not plaintiff suing on a note, alleged by defendants to have been held and negotiated in breach of covenant, was itself a holder in due course or had derived its title from a holder in due course, held to be a question for the jury.

4. **BILLS AND NOTES, § 448***—*when evidence sufficient to sustain finding that note was purchased in due course from holder in due course.* In an action by a corporation on a note which it had received by indorsement from one of its officers before maturity, who had received such note from an officer of the payee to apply on a personal debt of such latter officer, evidence held sufficient to sustain a finding that plaintiff purchased such note in due course, and had derived its title from a holder in due course.

5. **BILLS AND NOTES, § 253***—*who is holder for value in due course.* One who receives a negotiable note, before maturity as payment or security for a pre-existing debt, and without any express agreement, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free of latent defenses on the part of the maker that the note was accompanied

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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by breach of covenants on the part of prior holders in consideration of which the note was given and a breach of faith on the part of such prior holders in its negotiation.

6. MUNICIPAL COURT OF CHICAGO, § 15*—*when exclusion of evidence of agents of adverse party proper.* The exclusion of the evidence of agents of plaintiff corporation when called for cross-examination under the Municipal Court Act, Hurd's Rev. St., ch. 37, sec. 33 (J. & A. ¶ 3345), by the defendants, in an action on a note on the question of failure of consideration or breach of faith in its negotiation, *held* correct where at the time in question defendants had not yet shown failure of consideration for the note or breach of faith in its negotiation so as to cast upon the plaintiff the burden of showing that it was a holder in due course.

7. APPEAL AND ERROR, § 479*—*when objections to instructions not available.* Where the record is barren of any objection or suggestion with reference to instructions given, defendants cannot complain on appeal of any error in such instructions, but it is counsel's duty to bring the matter to the attention of the court at the time.

**Wolf, Sayer & Heller, Appellant, v. T. R. Tessem,
Appellee.**

Gen. No. 21,041. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed March 15, 1916.

Statement of the Case.

Action of replevin by Wolf, Sayer & Heller, a corporation, plaintiff, against T. R. Tessem, defendant. From an order on motion of defendant dismissing the suit and for a return of the property taken under the writ, plaintiff appeals.

On July 11, 1913, a writ of replevin was served on T. R. Tessem, defendant, who on July 17th entered his appearance. On September 4, 1914, upon motion of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and notice thereof, the court dismissed the suit and ordered a return of the property taken under the aforementioned writ.

The record before the Appellate Court (certified to be complete) consisted of the affidavit for replevin, the writ of replevin, the replevin bond, the appearance of the defendant, the motion to dismiss the cause, and the order of dismissal. Although the cause was pending for more than a year at a time it was dismissed, no declaration was ever filed. The record contained no bill of exceptions, stenographic report or statement of facts.

C. C. COLLINS, for appellant.

HERMAN WELK, for appellee; JESSE WILCOX, of counsel.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1295*—*when action of court in dismissing action presumed proper.* Where record of action of replevin before Appellate Court, certified to be complete, consists only of affidavit for replevin, the writ, bond, appearance of defendant, motion to dismiss and order of dismissal, which latter was entered after the cause had been pending longer than a year, and no declaration was filed during such time, and there is nothing in the record to indicate why the cause is dismissed, the action of the court in so doing must be presumed to be proper.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Baldwin Company, Plaintiff in Error, v. W. C. Keeley,
Defendant in Error.****Gen. No. 21,139.**

1. **CHATTEL MORTGAGES, § 48***—*when invalid for defective execution and acknowledgment as against third parties.* A mortgage which is executed and acknowledged in 1914 by an attorney in fact acting for such mortgagors under a power of attorney, although it may have been valid as between mortgagor and mortgagee, is invalid as against subsequent lienors not parties or privies thereto, inasmuch as it was not acknowledged and executed by the mortgagors in accordance with section 2 of the Mortgage Act, Rev. St., ch. 95 (J. & A. ¶ 7577), as it existed when the mortgage was executed and acknowledged.

2. **CHATTEL MORTGAGES, § 1***—*when statute in relation to strictly construed.* Section 2 of the Mortgage Act, Rev. St., ch. 95, as it existed in 1914 (J. & A. ¶ 7577), being in derogation of the common law, must be strictly construed, and chattel mortgages not executed, acknowledged and recorded as provided therein are invalid as to those not parties or privies thereto.

3. **REPLEVIN, § 123***—*what does not constitute prima facie case in action against person claiming innkeeper's lien.* Where mortgagee of a piano in its replevin suit against one claiming an innkeeper's lien on such piano did not confine its evidence merely to the execution of the mortgage and a breach of its covenants, but by its own evidence showed defendant's possession was not mere naked possession of a disinterested third person, but the possession by virtue of an innkeeper's lien, held that such proof did not make a prima facie case for plaintiff in the absence of proof of facts negative to the right to an innkeeper's lien.

4. **INNKEEPERS**—*what constitutes effects and valuables which are subject to lien.* Under the Innkeeper's Act, Rev. St. ch. 71, sec. 1, 2 (J. & A. ¶¶ 6193, 6194), providing for a lien upon all "baggage," "other valuables" and "effects" brought into a hotel by guests, a player piano brought into a hotel by a guest must be considered as part and parcel of his effects or valuables.

5. **APPEAL AND ERROR, § 1786***—*when case not reversed upon failure to raise questions in lower court.* Courts of review are opposed to the reversal of cases upon questions which should have been raised in the court below and which are raised for the first time on appeal or error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baldwin Company v. Keeley, 198 Ill. App. 287.

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916. Rehearing denied March 30, 1916.

Statement by the Court. This is a replevin action brought by plaintiff in error (plaintiff below) against defendant in error (defendant below) to recover possession of a player piano. At the close of plaintiff's case, on motion of the defendant, the court instructed the jury to find the issues for the defendant, whereupon the jury returned a verdict finding the right to the possession of said property in the defendant and assessing defendant's damages in the sum of one cent. Upon this verdict the court rendered a judgment in favor of defendant and awarded a writ of *retorno habendo*, to reverse which plaintiff has sued out this writ of error.

JOSEPH E. WINTERBOTHAM, for plaintiff in error.

ROBERT C. WHEELER, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

The evidence offered on behalf of plaintiff showed that plaintiff, on February 18, 1914, sold a Hamilton player piano to a Mrs. Gertrude Mace and a Mrs. E. G. Russell for \$500, payable in monthly instalments; that on the same day the said Mrs. Mace and Mrs. Russell executed a power of attorney to one Rosecrans, to execute and deliver to the plaintiff a chattel mortgage covering the instrument in question, to secure the payment of the purchase price; that said chattel mortgage contained the following covenants: That if default should be made in the payments, or if the goods were removed without the consent of the plaintiff (the mortgagee), or if the mortgagee should feel unsafe or

insecure, the mortgagee (plaintiff) might declare the entire amount due or take possession of the property, without notice or demand; that said mortgage was executed by the said Rosecrans, acting under said power of attorney, on June 29, 1914, and recorded July 1, 1914; that the piano was delivered on February 19, 1914, to 5021 Grand boulevard, Chicago, where Mrs. Russell and Mrs. Mace lived, the former having charge of the apartment; that on or about March 4th Mrs. Mace left Mrs. Russell's apartment; that the piano, however, remained there; that on or about June 1st, Mrs. Russell and a Mrs. Ray took two rooms at the New Southern Hotel, owned by the defendant; that among the effects which they brought there was the piano in question; that about two weeks thereafter they left the hotel, leaving, among other effects, said player piano.

The evidence further shows that on October 9th a representative of plaintiff (one Lawrence) talked with defendant and stated to him that he wanted to get the player piano left there by Mrs. Russell; that defendant told him Mrs. Russell and Mrs. Ray had left the hotel, leaving said player piano and some worthless property, and that he (defendant) had decided to hold the player piano for the indebtedness due the hotel, and for him (Lawrence) to take the matter up with his (defendant's) attorney; that on October 9th Lawrence consulted with Mr. Winterbotham, counsel for plaintiff.

The evidence further shows that Mr. Winterbotham took the matter up with Mr. Wheeler, counsel for defendant, and on October 14th received the following letter:

"I find that Mrs. Ray and Mrs. Russell left an unpaid bill at the New Southern Hotel amounting to \$157.64. Upon receipt of this amount, we shall be glad to deliver your piano to you.

"After you have investigated the law in regard to Inn-keeper's liens along the lines that I suggested to-day, I wish you would call me up and let me know

whether or not you think we are right in contending that we have a lien on the piano.

Yours truly,

Robert C. Wheeler."

that thereafter Mr. Winterbotham again talked with Mr. Wheeler over the telephone and was told that defendant would not give up the piano unless the amount mentioned in the foregoing letter (\$157.64) was paid him; that Mr. Winterbotham replied that he would not pay this because his client had been told by defendant "that the player piano was all right at the hotel and that there would be no storage charges on it"; and that he (defendant) knew plaintiff owned the player piano by virtue of a chattel mortgage.

Under the foregoing evidence, plaintiff maintains that it had made out a *prima facie* case, wherefore the court erred in directing a verdict for the defendant and in entering judgment thereon.

It is an admitted fact in the case, that the mortgage upon which plaintiff rests its title was not executed by the mortgagors personally, but that it was executed by an attorney in fact acting for them, and that the acknowledgment in the Municipal Court of Chicago was likewise made under a power of attorney. Under the holding of our Supreme Court, such execution and acknowledgment did not comply with section 2 of our Mortgage Act, Rev. St., ch. 95 (J. & A. ¶ 7577), as it then existed, which act is in derogation of the common law and must therefore be strictly construed; and it has been further held that a chattel mortgage not executed, acknowledged and recorded as provided for by statute, even though valid as between mortgagor and mortgagee, is invalid as to those not parties or privies thereto. *W. W. Kimball Co. v. Polakow*, 268 Ill. 344; *id.* 190 Ill. App. 174; *Second Nat. Bank v. Thuet*, 124 Ill. App. 501. At the time this chattel mortgage was executed there was no provision in the statute authorizing the execution and acknowledgment of a chattel

mortgage under a power of attorney, and therefore, under the law as it existed at the time the mortgage in question was executed, it was not a valid mortgage as against a subsequent incumbrancer, lienor, judgment creditor or an officer by virtue of a valid writ, execution or warrant. In arriving at this conclusion, we are not unmindful of the fact that since the decision in *W. W. Kimball Co. v. Polakow, supra*, was handed down, our Legislature amended section 2 of our Mortgage Act, *supra*, whereby an acknowledgment by an attorney in fact acting under a power of attorney is authorized. *Session Laws* of 1915, p. 528.

Plaintiff contends that in the case at bar, all that was necessary to make out a prima facie case was to show the execution of the mortgage and a breach of its covenants, and that the question whether said mortgage was valid as against third persons was one of defense. While counsel does not cite *Allcock v. Loy*, 100 Ill. App. 573, yet that case supports its contention. In that case, however, the court also held that the evidence offered by the plaintiff did not disclose that defendant (a third person) was such interested third person as the statute provided for. To meet the contention of the plaintiff, defendant cites *Second Nat. Bank v. Thuet, supra*, which was a replevin action brought by the mortgagee to recover certain property from a person not the mortgagor. The mortgage upon which that suit was based had not been executed in conformity to the statute, and the court held that where the property was found in possession of a third person, it was incumbent upon the plaintiff, in addition to showing the execution of the mortgage and a breach of its covenants, to offer evidence showing that the third person had no right or interest therein as provided by the statute. In arriving at that conclusion, however, the court recognized that thereby it put upon the plaintiff the necessity of proving a negative, which was contrary to the general rule, but stated that was a misfortune resulting from

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his defective mortgage. These decisions are at variance with each other, and while the writer of this opinion, speaking for himself alone, is in accord with the reasoning and the rule of law as announced in *Allcock v. Loy, supra*, yet under the facts in the case at bar, under either holding, we are of the opinion that plaintiff failed to make out a prima facie case, because the plaintiff did not confine its evidence merely to the execution of the mortgage and a breach of its covenants, but by its evidence showed defendant's possession was not a mere naked possession of a disinterested third person, but that it was the possession of a lienor. The evidence clearly shows that the piano in question was brought to defendant's hotel by Mrs. Russell, one of the mortgagors, and placed in the room occupied by herself and Mrs. Ray, and that defendant claimed there was due him for hotel charges the sum of \$154.67, and that defendant claimed an innkeeper's lien on this player piano for said sum, as authorized under the statute. In *Allcock v. Loy, supra*, the court said, p. 575:

“Appellant's evidence made a prima facie case, and did not disclose that appellee was in any manner such an interested third person as the statute provides for, and as appellee offered no evidence, the court could not assume that he had such interest. Mere naked possession is not such an interest, and if appellee had other interest than mere possession, the burden was upon him to prove it. Appellant should not have been required to prove that appellee had not such interest.”

But in the case at bar the evidence shows more than the mere naked possession; it shows defendant to be such interested third person as the statute provides for, and therefore plaintiff was also required to prove, in making out a prima facie case, such facts as would negative the right to an innkeeper's lien that the evidence showed defendant was entitled to. No evidence of this character was submitted by plaintiff, and in the absence thereof, the plaintiff failed to make out a

prima facie case, under either *Allcock v. Loy, supra*, or *Second Nat. Bank v. Thuet, supra*, and the court properly directed a verdict for the defendant.

While plaintiff contends that the piano in question is not such property as the Legislature contemplated should be subject to an innkeeper's lien, we cannot concur therein. Section 2 of the Innkeepers Act, Rev. St. ch. 71 (J. & A. ¶ 6194), provides in part as follows:

"Every hotel proprietor shall have a lien upon all the baggage and *effects* brought into said hotel by his guests for any and all proper charges due him from such guests for hotel accommodations," * * * (italics ours)

and section 1 of the Lien Act, Rev. St., ch. 82 (J. & A. ¶ 7179), states:

"Hotel, inn and boarding house keepers shall have a lien upon the baggage and *other valuables* of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders, for the proper charges due from such guests or boarders for their accommodations, board and lodgings and such extras as are furnished at their request." (italics ours)

A piano brought into a hotel by a guest must, in view of the foregoing language, be considered as part and parcel of either his or her *effects* or *valuables*.

Plaintiff further contends that even though defendant was entitled to a lien, yet under section 22 of the Replevin Act, Rev. St., ch. 119, (J. & A. ¶ 9207), the judgment was improper; that said section provides that where the evidence shows that the property was held by the defendant for the payment of money due, the judgment may be in the alternative viz, that plaintiff be ordered to pay the amount rightfully due defendant, within a certain time, or make return of the property; that in the case at bar the right of the defendant in the property, at best, was but a lien for money due, and that therefore the court should have entered a judgment in the alternative, and that its

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failure to do so was error. This contention is raised for the first time in this court. We have carefully examined the record and find it barren of any request by plaintiff for such form of judgment; nor was any exception taken to the entering of the judgment complained of. Courts of review are opposed to reversing cases upon questions which should have been raised in the court below and which are raised for the first time on appeal or writ of error.

Other errors have been assigned, which we have carefully examined, but are of the opinion that they are without merit.

Finding no reversible error, the judgment of the Municipal Court of Chicago will be affirmed.

Affirmed.

**Louis A. Lencki, Defendant in Error, v. John Schultz
and Mary Schultz, Plaintiffs in Error.**

Gen. No. 21,212. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916.

Statement of the Case.

Action of forcible entry and detainer brought by Louis A. Lencki, plaintiff, against John Schultz and Mary Schultz, defendants, under clause 6 of section 2 of the Forcible Entry and Detainer Act, Rev. St., ch. 57 (J. & A. ¶ 5843). From a judgment entered on a verdict for plaintiff, defendants prosecute a writ of error.

Plaintiff's evidence showed that defendants were in possession of the premises in question at the time of

the demand for possession and the bringing of the action; that defendant John Schultz was on the property at the time of the execution of the deed conveying same. There was introduced in evidence a quitclaim deed from John Schultz and Mary Schultz, his wife (defendants), to the plaintiff, and the demand for possession served by plaintiff upon the defendants.

On behalf of the defendants there was an offer to show that at the time this quitclaim deed was given to the plaintiff, the defendants were threatened with a personal injury suit; that this conveyance was made at the suggestion of plaintiff, who said he could settle the case for little money; that he would hold the property as security for moneys advanced in settlement and not place the deed of record; that the property was to be deeded back when the personal injury suit had been disposed of and the plaintiff reimbursed for advances made, if any; that the deed was given with the understanding that it should not in any way disturb the possession of defendants; that nothing was ever paid by Lencki; that when defendants demanded the deed back, plaintiff discharged John Schultz from his employ and started an action in forcible detainer. After this offer was made, counsel for defendants stated: "I offer to show by the witness that in fact the title to the property in question is involved in this suit, and ask to have the court pass upon that issue." This offer was rejected and exception taken thereto. There was also an offer to show that in a former action of forcible entry and detainer plaintiff had testified that John Schultz was to remain in possession as a tenant of the plaintiff, which offer was also refused. In making this offer, defendants contended that the relationship of landlord and tenant did not exist.

Before the close of the case plaintiff offered in evidence a decree entered in the Circuit Court of Cook county in the case of Mary Schultz, one of the defendants herein, against plaintiff and John Schultz, the

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other defendant, to set aside the deed (which was the deed offered in evidence in the case at bar) given by her husband and herself to the plaintiff; he also offered in evidence the bill of complainant and his (Lencki's) answer thereto. That suit was based upon practically the same facts as defendants offered to prove as matters of defense in the action at bar. Objection was made on behalf of John Schultz, on the ground that he was not a party to the action. It appeared, however, that he attended as a witness for the complainant in that action.

COBURN & BENTLEY, for plaintiffs in error.

SMIETANKA, JOHNSON & MOLTHROP, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **FORCIBLE ENTRY AND DETAINER, § 22***—*what is nature of right of possession in grantee.* In an action of forcible entry and detainer by a grantee holding a deed against the grantor in possession, who has refused, upon demand, to give possession, the question of title between plaintiff and defendants or any one else cannot be tried, and the right to possession in the plaintiff is not dependent upon his title but upon the existence of specific facts mentioned in Forcible Entry and Detainer Act, Rev. St., ch. 57, sec. 2, clause 6 (J. & A. ¶ 5843).

2. **FORCIBLE ENTRY AND DETAINER, § 16***—*when action lies for unlawful detainer by grantor.* A quitclaim deed to the plaintiff from the grantor and a continuance in possession by the grantor after a written demand for possession are facts upon which an action of forcible entry and detainer may be maintained under Forcible Entry and Detainer Act, Rev. St., ch. 57, sec. 2, clause 6 (J. & A. ¶ 5843).

3. **FORCIBLE ENTRY AND DETAINER, § 73***—*when evidence inadmissible as bearing upon question of title of plaintiff.* In an action of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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forcible entry and detainer by a grantee against a grantor, withholding possession after demand, under the Forcible Entry and Detainer Act, Rev. St., ch. 74, sec. 2, clause 6 (J. & A. ¶ 5843), evidence that the quitclaim deed from defendant to plaintiff was intended to secure plaintiff for moneys advanced and that the deed was given with the understanding that it should not disturb defendants' possession and that nothing was ever paid by plaintiff, was not competent because it sought to put in issue the title of the plaintiff.

4. **FORCIBLE ENTRY AND DETAINER, § 77***—*when deed admissible to show fact of possession.* In an action of forcible entry and detainer by a grantee against a grantor the introduction of the deed to the premises is proper and is necessary, in connection with the fact of possession, to show that there was a grantor who conveyed and a grantee to whom the conveyance was made.

5. **APPEAL AND ERROR, § 1466***—*when admission in evidence of pleadings in prior case harmless error.* Where, in an action of forcible entry and detainer it was contended that there was an improper admission in evidence of the bill, answer and decree in a prior case wherein one of the defendants in the case at bar was complainant, and in which the plaintiff and the other defendant in the case at bar were defendants, which prior case was for the purpose of setting aside the deed upon which the case at bar depends, and where objection to such evidence was not made by the complainant but by her husband, who was defendant in such suit and a witness in behalf of the complainant therein, *held* not error to admit such evidence and that, at best, it was only cumulative, and inasmuch as the court in the case at bar instructed the jury to find for plaintiff, its admission could not be considered harmful.

6. **ESTOPPEL, § 87***—*when tenant estopped to claim relationship of landlord and tenant.* In an action of forcible entry and detainer, where defendant claims that conveyance from him to plaintiff was to secure plaintiff for money advanced, such defendant is estopped from thereafter claiming the relation of landlord and tenant and cannot present evidence that in a previous trial in forcible entry and detainer, plaintiff testified that defendant was his tenant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Reese v. Reese, 198 Ill. App. 298.

Margaret Reese, Appellee, v. Henry C. Reese, Appellant.

Gen. No. 21,300. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916.

Statement of the Case.

Bill for divorce by Margaret Reese, complainant, against Henry C. Reese, defendant. From an order committing defendant to jail until he complied with an order for the payment of temporary alimony, and an additional sum as charges of the master in chancery, or until released by law, not to exceed the period of six months, defendant appeals.

On December 21, 1914, a rule was entered upon Henry C. Reese, defendant, to show cause why attachment should not issue for his failure to pay temporary alimony during the preceding five weeks. Defendant filed a sworn answer wherein he stated that he had no money with which to pay the alimony to the complainant, and set forth in detail his income, expenditures and liabilities; also that he was taken sick on November 21st, and since December 2nd had been confined to his bed, and that for a great part of the time he was under the care of a physician, his ailment being ulcer of the stomach. Attached thereto was an affidavit of his physician under date of December 21st, stating that since December 2nd defendant had been under his care; that he was suffering from ulcer of the stomach and was unable to work.

The matter was referred to a master in chancery to determine whether defendant was in contempt of court for failure to pay all or any part of the alimony due under the order of the court theretofore entered, the

matter to make his report within forty-eight hours. On January 14th the master filed his report, wherein he made certain findings from which he concluded that defendant was in contempt of court, and recommended that defendant be committed until he should properly comply with the rule in relation thereto. Said report contained the testimony taken before him on the reference. On January 15th the master submitted a supplemental report wherein it was stated that the objections filed to said report by defendant were duly argued and overruled, and wherein he further certified that a stenographer was necessarily employed to transcribe the testimony; that a copy of such testimony certified by the master and attached to his report was made by the stenographer; that a reasonable fee for such stenographic services was \$13.50, and that said master's fee therein was \$25, making a total of \$38.50. It was ordered that defendant's objections filed thereto stand as exceptions. On January 18th the court approved the master's report, and found that defendant was able to pay the alimony due under the order theretofore entered, and that defendant wilfully refused to pay said alimony; that there remained due and unpaid to the complainant the sum of \$45 as alimony on the order theretofore entered by the court; allowed and approved the master's charge of \$38.50, and ordered that defendant "be committed to the County Jail of this County, until he shall have complied with said order of this Court, and shall have paid all of said amount of Forty-five (\$45.00) Dollars, as alimony due, and the additional sum of Thirty-eight and 50/100 (\$38.50) Dollars, as Master's charges, or until released by due process, not to exceed the period of six months however."

JOHN E. VAN NATTA, for appellant.

FRANK J. SNITE, for appellee; LEO H. HOFFMAN, of counsel.

The People v. Mehan, 198 Ill. App. 300.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1399*—*when findings of master sustained.* Findings of a master on question of fact which have been concurred in by the chancellor must be affirmed unless clearly and manifestly against the weight of evidence.

2. CONTEMPT, § 77*—*when payment of costs in contempt hearing condition precedent to discharge from order of commitment for contempt.* Master's charges on account of hearing, whereby defendant was found guilty of contempt for default in payment of alimony, are not ordinary costs in a chancery suit that may only be collected by execution, but inasmuch as the costs were incurred by defendant's failure to comply with a previous order of the court which led to the contempt proceedings, defendant himself was responsible for such costs, and payment of them may be made a condition precedent to a discharge from an order of commitment entered because of the contempt.

**The People of the State of Illinois ex rel. Mehan,
Defendant in Error, v. David T. Mehan, Plaintiff
in Error.**

Gen. No. 21,454.

1. DIVORCE, § 137*—*when wife entitled to attorney's fees for past services in dismissed case.* Where during the pending of divorce proceedings, afterwards dismissed, complainant is allowed solicitor's fees for past services, she is entitled to retain same in spite of the dismissal, it appearing that the payment thereof is necessary in order to enable her to further carry on an action or maintain her defense thereto.

2. APPEAL AND ERROR, § 1270*—*when presumed that chancellor found that allowance of attorney's fees to complainant in divorce action was necessary.* Where nothing but the order in divorce proceedings allowing solicitor's fees is before the court, in the absence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Mehan, 198 Ill. App. 300.

of any evidence to the contrary, the court must presume that the chancellor believed the wife to have a probable cause of action and that the payment of such fees, whether for past services or for future services, was necessary to enable the wife to maintain her action.

3. DIVORCE, § 135*—*when wife entitled to solicitor's fees.* The allowance of solicitor's fees under the Divorce Act, Hurd's Rev. St. ch. 40, sec. 15 (J. & A. ¶ 4230), is not contingent upon a successful termination of the suit, but if it appears at the time of making the request that the wife has a probable cause of action, she is entitled thereto.

4. DIVORCE, § 149*—*when order for allowance of attorney's fees to wife as complainant presumed to be for benefit of defendant.* An allowance of solicitor's fees in an order pending divorce proceedings whereby defendant is permitted to pay \$100 within thirty days and the remaining \$100 in another thirty days must be presumed to have been for the benefit of defendant himself.

5. DIVORCE, § 139*—*when defendant not relieved from payment of attorney's fees.* The mere fact that the terms for payment of attorney's fees to the wife as complainant are made convenient to the defendant does not relieve defendant of paying them when the suit afterwards terminates in his favor and is dismissed, where the court retains power to compel such payment notwithstanding the dismissal of the bill for want of equity.

6. CONTEMPT, § 70*—*when order of commitment not defective as denying defendant right to purge himself by payment of money.* An order that defendant in contempt proceedings brought on account of his nonpayment of solicitor's fees allowed in divorce proceedings against him, shall be entitled to his relief from imprisonment upon payment of \$100 at any time after commitment, but that in default thereof he cannot be held in jail for more than thirty days, cannot be considered fatally defective on the contention that it omits the right of defendant to purge himself by paying the money.

Error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed March 15, 1916.

ERNEST SAUNDERS, for plaintiff in error.

JAMES E. BROWN, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Plaintiff in error (defendant below) was found guilty of contempt for nonpayment of solicitor's fees allowed by the court in an order entered June 24, 1914.

This proceeding is the aftermath of a suit for divorce by Telona Mehan, the relatrix herein, against the defendant. In June, 1913 the relatrix filed a bill for separate maintenance, and in November of the same year, a supplemental bill for divorce, upon the hearing of which the cause was dismissed on June 29, 1914, for want of equity. In its decree of dismissal, however, the court expressly retained jurisdiction of the parties for the purpose of enforcing its order of June 24th allowing the relatrix \$200 as solicitor's fees.

Defendant, in urging a reversal of the foregoing order, contends, first: "That the dismissal of the bill for want of equity disposed of the entire subject-matter, and that there was nothing left to adjudicate upon; that all interlocutory orders fall on the dismissal." In support thereof he refers us to *Newman v. Newman*, 69 Ill. 167; *Anderson v. Steger*, 173 Ill. 112, and *Chestnut v. Chestnut*, 77 Ill. 346. These cases, defendant contends, establish the rule of law, that where parties have settled the controversy and resumed living together, or where the wife is the complainant and the court finds against her, the court has no power to order payment of solicitor's fees for past services; that section 15 of our Divorce Act, Rev. St., ch. 40 (J. & A. ¶ 4230), wherein it is provided that the husband pay to the wife or into court, for her use during the pendency of the action, such sum or sums of money as may enable her to maintain or defend a suit, contemplates that said provision shall be made in advance. In *Anderson v. Steger*, *supra*, the court refers to *Beadleston v. Beadleston*, 103 N. Y. 402, as announcing the same principle of law. However, in *Beadleston v. Beadleston*, *supra*, the court, in reversing an order for solicitor's fees, stated that it based its decision

upon the precise facts there in evidence, and said further, p. 405:

“We have no doubt that an allowance to a wife during the pendency of the action, for some past expense, might be authorized if it were shown that its payment was necessary to enable her to further carry on the action or her defense thereto,”

and in *McCarthy v. McCarthy*, 137 N. Y. 500, the court in announcing the same principle of law said, p. 503:

“Upon such an application, if it should appear that in previously carrying on her action the plaintiff had incurred expense, the payment of which was essential to be made in order that she might further maintain or prosecute her rights, under the judgment, it would be quite within both the letter and the spirit of the statute to comprehend in an allowance the unpaid item of the past.”

To the same effect is *Loveren v. Loveren*, 100 Cal. 493 and *Schuster v. Schuster*, 84 Minn. 403, 87 N. W. 1014. In all these States the provision in the statute for allowance of solicitor's fees is practically identical with that in our statute. We have reviewed the decisions of many other States, and find that the foregoing represent the weight of authority. They all hold that although a wife cannot ordinarily obtain an allowance for solicitor's fees for past services, she may receive same where it is shown that the payment thereof is necessary in order to enable her to further carry on an action or maintain her defense thereto. In the Illinois cases cited by counsel and referred to *supra*, the order for solicitor's fees was entered at the time the cause was dismissed, while in the case at bar the order was entered during the pendency of the action (five days before the dismissal and before the hearing).

Defendant further contends that the record in the case at bar shows that the allowance for solicitor's fees was for past services, and consequently the court was without power to enter the order. We have before us only the order itself, which is as follows:

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“On motion of complainant herein and upon complainant exhibiting to the court her petition for an allowance of solicitor’s fees and an itemized statement attached thereto, enumerating the legal services performed by solicitor for complainant in said cause, and upon evidence heard in open court, both oral and documentary, and it appearing that said defendant has heretofore paid to the complainant on account of her solicitor’s fees, the sum of only \$25.00, the court finds:

“That the defendant is able to pay reasonable solicitor’s fees in said cause:

“NOW THEREFORE, IT IS ORDERED, that said defendant, David T. Mehan, pay to the complainant, Telona Mehan, as and for her reasonable solicitor’s fees in said cause an additional sum of \$200.00, in the manner following:

“One Hundred (\$100.00) Dollars of said sum within thirty (30) days and the remaining One Hundred (\$100.00) Dollars within sixty (60) days.”

While reference is made in said order to the petition praying for an allowance of solicitor’s fees and also to an itemized statement, yet neither the petition, the itemized statement nor any of the oral or documentary evidence appear in the record. There is nothing in the foregoing order to indicate that the allowance of \$200 was the amount asked for in the petition, or that it equaled the amount shown by the itemized statement of account therein referred to. In the absence of any evidence to the contrary, we must presume that at the time the order was entered, the chancellor was of the opinion that the relatrix had a probable cause of action and that the payment of said \$200, whether for past services or for services yet to be performed, was necessary to enable the relatrix to maintain her action.

It must be presumed that when the court entered the order in question, the provision therein allowing defendant thirty days in which to pay \$100, and thirty days more in which to pay the remainder, was for the benefit of the defendant and at his request. The allowance of solicitor’s fees under our Divorce Act is not

contingent upon a successful termination of the suit, but if it appears at the time of making the request that the wife has a probable cause of action, she is entitled to the benefit of section 15 of our Divorce Act (J. & A. ¶ 4230). The mere fact that the court, in consideration of the husband's circumstances, makes the terms of the payment thereof convenient for him is no reason why the husband should be relieved of paying them when the suit terminated unfavorably to the wife. The payment of solicitor's fees being *in futuro*, it must be presumed that when the court proceeded to hear the case it naturally expected that the order would be obeyed, independently of the outcome of the suit. The court heard the case on this presumption, and counsel continued his services upon a like presumption; and if the court was without the power to enforce the order in question, regardless of the outcome of the suit, the wife would be divested of the benefit of a statute which was expressly enacted in her interest. Recognizing that power, the court reserved, in its decree, the jurisdiction to compel payment of the solicitor's fees: Such a reservation also appeared in the decree in *Anderson v. Steger, supra*, and it was in no way criticised by our Supreme Court. We are therefore of the opinion, from the facts and circumstances in the case at bar, that the court in entering the order of June 24th for the payment of solicitor's fees, did so to enable the relatrix to maintain her action, and that the court had the power to compel a compliance with said order by the defendant, even though the bill was dismissed for want of equity.

Finally it is maintained that the commitment order is fatally defective in that it omits the right of defendant to purge himself of the contempt by paying the money. We cannot concur therein. This order, reasonably construed, can mean only that defendant shall be entitled to his release from imprisonment upon payment of \$100 at any time after commitment, but that

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in default thereof, he cannot be held in jail for more than thirty days. In *Kyle v. People*, 72 Ill. App. 171 (relied upon by defendant), the order of commitment was quite different from the one now before us.

Finding no reversible error, the order of the Circuit Court of Cook county will be affirmed.

Affirmed.

Stanley Kumorowski, Appellee, v. Armour & Company, Appellant.

Gen. No. 20,911. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed March 15, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Stanley Kumorowski, plaintiff, against Armour & Company, defendant, for \$7,500 as damages on account of plaintiff's fall from defendant's freight elevator. From a judgment in favor of plaintiff, defendant appeals.

The accident upon which the suit is based occurred on May 15, 1911, while plaintiff was trucking a load of empty boxes in the canning department of defendant's packing house. Plaintiff, a Lithuanian, had been in this country a year at the time. Previous to the accident, for about six or seven months, plaintiff had been trucking heavy boxes. He testified that he had never previous to the accident, trucked empty boxes. Except during a period of several months, empty boxes had been trucked by boys. Different witnesses testified conflictingly as to whether or not he had trucked empty boxes and as to the amount thereof.

At the time of the accident plaintiff was twenty years old, weighed from 175 to 176 pounds, and was five feet, seven inches in height. On the day of the accident, while he was trucking full boxes, he was ordered to put down his truck and take one of the trucks used for empty boxes. Trucks used for full boxes were ordinary hand trucks, with handles, two wheels in front, and a back at the end, over the wheels, from two to two and one-half feet high. The trucks used for empty boxes were similar except that their backs were between four and four and one-half feet high and their floors were thirteen inches above the ground, making the top of the back of the trucks from five feet, one inch, to five feet, seven inches high.

A foreman named Sullivan piled the boxes on his truck until they were, according to plaintiff's testimony, as high as the top of the fingers of his hand when his arm was stretched up full height. Sullivan then told him to take it from one room to the other, according to plaintiff's evidence, but all this was denied by Sullivan. Plaintiff also testified that boxes were piled to within five inches of the end of the handles. The elevator upon which plaintiff wheeled the truck was five feet, eight inches wide, seven feet, five inches long and open at both ends. Consequently, when a truck was placed in the exact center of the elevator, there would be a margin of substantially one foot between either end and the edge of the elevator. There was a clearance between the elevator and the floor of three-quarters of an inch.

The elevator was operated by a man on the fifth floor at the top of the shaft. Plaintiff testified that he rang for the elevator, and as soon as it reached the second floor, wheeled his truck aboard and the elevator "went up right away." Plaintiff testified that he gave no signal for the elevator to go up, whereas the operator testified to the contrary. By a slant outward of the back of the truck used on this occasion, the clearance

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was reduced. Such slant was testified by plaintiff's witnesses to exceed four or five inches but not to be so much according to defendant's witnesses.

As it passed from the second to the third floor the top of the load struck a beam or joist, flush with and supporting the third floor. Had the load not projected more than three-quarters of an inch beyond the edge of the platform, it would have passed in safety. The boxes were knocked off against plaintiff, causing him to fall from the elevator to the bottom of the shaft, a distance of about twenty-five feet.

Plaintiff's declaration consisted of four original and five additional counts. The court instructed the jury to find for defendant on all except the first original and second additional counts. The first original count after setting out matters of inducement that defendant was a laborer engaged in transporting boxes from designated places and on an elevator by means of a hand truck, etc., charged defendant's duty to furnish plaintiff with a reasonably safe place in which to work, a disregard of that duty, an order and command for plaintiff to put an unusually large number of boxes on the truck and compliance with such order; that he was unable to see over the top of them, was ordered to convey the truck by means of said elevator to an upper floor, in obedience to which he so conveyed the truck; that by reason of the height of the boxes he was unable to observe accurately the position of the truck, and thereby the place where he was required to stand, while being moved upwards, became unsafe which was well known to the defendant but not to the plaintiff.

A. R. URION and A. F. REICHMANN, for appellant.

JOHN W. SUTTON, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 687*—*when evidence sufficient to sustain finding that master negligent in failing to guard elevator platform.* In an action for personal injuries where the first count in a declaration charged negligence in the failure to construct walls or other protection around an elevator in the canning department of defendant's packing house, and there was proof that such elevator was open at both ends and used by foreigners, acting as common laborers in elevating trucks, which, when placed on the platform of such elevator left very narrow margin thereon, and it appeared that the truck of plaintiff at the time of the accident was loaded with piles of boxes so high that the trucker could not see over the top, and the boxes, which projected slightly over the platform, struck a joist supporting an upper floor, fell off, and knocked plaintiff off the elevator, evidence held sufficient to sustain a finding that the failure to inclose the platform of the elevator constituted negligence.

2. MASTER AND SERVANT, § 156*—*what constitutes negligence in failing to guard platform of elevator.* What is usually done is not the standard for determining the question of negligence or ordinary care with reference to the failure of an employer to protect the platform of an elevator used by its servants with an inclosure.

3. APPEAL AND ERROR, § 1520*—*when refusal to give peremptory instructions in reference to some of counts in declaration, not reversible error.* If there is evidence sufficient to sustain the action laid in any one of three counts in a declaration, the refusal to give peremptory instructions with reference to the other two, even if erroneous, is not reversible error.

4. MASTER AND SERVANT, § 562*—*when proof of single count sufficient.* In an action for personal injuries sustained by a trucker while engaged in taking a truck of boxes to an upper floor of a building in an unguarded elevator operated by another servant, as a result of projecting boxes striking against a beam in the elevator shaft as the car ascended, falling off, and knocking plaintiff to the bottom of the shaft, it is immaterial that the court failed to give a formal instruction to find the defendant not guilty on a certain count, on the ground that there was no evidence to show that the elevator operator was negligent as alleged in such count, where there is evidence to sustain other counts in the declaration.

5. APPEAL AND ERROR, § 1628*—*when error in refusing to direct verdict as to particular count cured.* In an action by a servant for personal injuries sustained while in performance of his duties in taking a truck of boxes to an upper floor of a building in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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an unguarded elevator operated by another servant, as a result of projecting boxes catching against a beam in the shaft, as the car ascended, falling off and knocking the plaintiff to the bottom of the shaft, it is immaterial that the court failed to give a peremptory instruction to find defendant not guilty on a particular count, alleging that the injury was due to the negligence of the operator of the elevator because they were fellow-servants, where the court specifically instructed the jury that the plaintiff and elevator operator were fellow-servants, and that no recovery could be had on account of the negligence, if any, of the latter.

6. MASTER AND SERVANT, § 773*—*when question whether elevator unsafe place to work, for jury.* In an action by a servant for personal injuries sustained while in performance of his duties in taking a truck of boxes to an upper floor of a building in an unguarded elevator operated by another servant, as a result of projecting boxes catching against a beam in the shaft, falling off, and knocking plaintiff to the bottom of the shaft, *held* that there was ample evidence to justify the court in submitting the issue raised by the first additional count of plaintiff's declaration to the jury, such count having reference to facts which rendered unsafe the place where plaintiff worked and defendant's knowledge thereof, and the question whether such facts together with all the other facts in evidence rendered the place unsafe, and defendant's knowledge thereof, were properly submitted to the jury.

7. MASTER AND SERVANT, § 312*—*when servant assumes risks of employment.* The servant assumes not only the ordinary risks incident to his employment, but also all dangers which are obvious and apparent, and if he voluntarily enters into or continues in the service, knowing, or having the means of knowing, its dangers, he is deemed to have assumed the risks and to have waived all claims against the master for damages in case of personal injury.

8. MASTER AND SERVANT, § 739*—*when question of assumption of risk for jury.* The question whether the servant has assumed the danger which he encounters ordinarily is one of fact, but the question will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds.

9. MASTER AND SERVANT, § 751*—*when question of contributory negligence of servant for jury.* While the question whether a servant has been guilty of contributory negligence is ordinarily one of fact, it will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds.

10. MASTER AND SERVANT, § 698*—*when evidence insufficient to establish assumption of risk attendant on use of defective elevator.* In an action for damages for personal injuries sustained by a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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trucker while engaged in taking a truck of empty boxes to an upper floor of a building in an unguarded elevator operated by another servant, as a result of projecting boxes striking against a beam in the elevator shaft as the car ascended, falling off, and knocking plaintiff to the bottom of the shaft, *held* that the manifest weight of the evidence does not show that the hazard causing his accident was or should have been known to the plaintiff in view of circumstances that he was a common laborer at the bottom of the industrial scale, and that his regular work was that of trucking full boxes which were only piled two or two and one-half feet high upon his truck, while there was evidence that plaintiff at the time of the accident trucked a load so high that he could not see over the top of it, and there was a conflict in the evidence as to whether plaintiff had ever trucked a load of empty boxes previously.

11. MASTER AND SERVANT, § 699*—*when evidence insufficient to establish contributory negligence of servant using elevator.* In an action for damages for personal injuries sustained by a trucker while engaged in taking a truck of empty boxes to an upper floor of a building in an unguarded elevator operated by another servant, as a result of projecting boxes striking against a beam in the elevator shaft as the car ascended, falling off, and knocking plaintiff to the bottom of the shaft, evidence *held* insufficient to establish that plaintiff did not exercise all the care which his circumstances at and before the accident allowed.

12. APPEAL AND ERROR, § 1410*—*when verdict not disturbed as against weight of evidence.* Where questions of fact are passed upon by a jury properly and fully instructed as to the law, and a motion for a new trial is considered and refused by the trial court, the verdict will not be disturbed as against the weight of evidence on appeal, unless it is clearly so on some essential issue involved.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bishop v. Bowman Dairy Co., 198 Ill. App. 312.

**James F. Bishop, Administrator, Appellee, v. Bowman
Dairy Company, Appellant.**

Gen. No. 21,016.

1. WORKMEN'S COMPENSATION ACT, § 2*—*when employees presumed to have elected to be bound by act.* All employers included in sec. 3 of the Workmen's Compensation Act of 1913, Hurd's Rev. St., ch. 48, are, by section 2, of such act, conclusively presumed to have elected to be bound by its terms, unless they have manifested a contrary intention in the manner therein provided.

2. WORKMEN'S COMPENSATION ACT, § 3*—*who is not engaged in carriage by land or water.* In sec. 3 of the Workmen's Compensation Act, Hurd's Rev. St., ch. 48, the words "carriage by land or water" relate to those engaged in carriage as an "occupation, enterprise or business," and not to those engaged in a business where carriage is an incident, and a milk company is not within such terms so as to be liable for injuries to the driver of one of its wagons under such statute.

3. WORKMEN'S COMPENSATION ACT, § 3*—*who is not engaged in operating warehouses within act.* While defendant, a milk company, may have used and maintained "warehouses or general or terminal store houses" in connection with its business, *held* that it was not engaged in the business of operating them within the meaning of the statute.

4. WORKMEN'S COMPENSATION ACT, § 3*—*what enterprises not within scope of act.* Adopting the principle of statutory construction that a thing within the letter is not within the statute if not also within the intention, the Workmen's Compensation Law, sec. 3, clause 8, includes only enterprises of such extra-hazardous character that the Legislature or a municipality have felt called upon to make provisions for the guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or public therein, and municipal sanitary regulations applying to milk vendors or vehicle regulations, applying to all vehicles and operators alike, do not come within the meaning of such act.

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge; presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed March 15, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MONTGOMERY, HART, SMITH & STEERE, for appellant.

WILLIAM ENGLISH, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Bowman Dairy Company, appellant, hereinafter referred to as defendant, appeals from a judgment obtained by James F. Bishop, administrator of the estate of Frederick P. Noyes, appellee, hereinafter referred to as plaintiff, for \$2,850, recovered on account of the death of the decedent, and based upon the contention that the business of the defendant fell within the terms of section 3 of the Workmen's Compensation Act of July 1, 1913, which went into effect eight days before the accident. It was stipulated by the parties that if the defendant's business did come within the terms of section 3, the proper amount for which it was liable was \$2,850.

Plaintiff's declaration, in substance, charged that defendant was possessed of a large number of buildings, outside of Chicago, known as bottling stations to which milk was delivered; that within these buildings the defendant had installed machinery and appliances used by numerous employees in separating and bottling milk and cream and canning and packing various other dairy products; that the stations were located close to railroad tracks on which were placed special cars, used exclusively in the transportation of defendant's milk and other dairy products, between the stations and defendant's switch tracks in Chicago, although these cars might be used by other dairy companies; that defendant loaded large quantities of these products on the cars, which were transported to its switch tracks in Chicago, where defendant unloaded them and distributed them by horses and wagons to consumers throughout the city; that at some of the switch tracks defendant maintained buildings used as offices and

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places where excess and unsold milk and other products were deposited and kept until disposed of. It further recites that there were municipal ordinances in Chicago, regulating vendors of milk and cream, providing license fees, requiring the name to be stamped on the cap of the bottle, and containing certain health regulations providing for the disposal of unfit products. It also recites the general vehicle regulations applicable to horse-drawn vehicles, and requiring horses to be hitched when left standing in any street; that the duties of the plaintiff's intestate, who was a driver in the employ of the defendant, were to unload milk and other dairy products from the cars upon the wagons, and deliver them to consumers and to return the undelivered products to defendant's buildings; that while he was driving a wagon belonging to the defendant, carrying milk and other products for delivery, the horse attached to his wagon became unmanageable and ran away, "and the plaintiff was then and there thrown to and upon the ground and was thereby then and there killed." It avers the sending of the notice required by the statute, the granting of letters of administration, a statement of the amount of his wages, and avers that by force of the statutes defendant became liable to the beneficiaries thereunder in the sum of \$3,500, payable in weekly instalments, and that defendant has refused to pay them. Plaintiff further averred that plaintiff and defendant had agreed that if defendant is liable in this cause as an employer under the statute in such case made and provided, being the act of the Legislature of Illinois, approved June 28, 1913, entitled "An Act to promote the general welfare," etc., then the sum of \$2,850 was the full value of the right of plaintiff to compensation for the death of said Frederick P. Noyes, deceased. Defendant elected to stand by its general demurrer, which had been overruled.

The sole question in the case is as to whether the defendant company, which it was agreed had not affirmatively elected to be bound by the terms of the Workmen's Compensation Act of 1913, came within the terms of the third section thereof. It may be said that all employers included in that section are, by the second section, conclusively presumed to have elected to be bound by the terms of the act, unless they have manifested a contrary intention in the manner therein provided.

The third section of the act, which appears as paragraph 128 of chapter 48, Hurd's Revised Statutes of Illinois (1913) is as follows:

"3 (a) In any action to recover damages against an employer, engaged in any of the occupations, enterprises or businesses enumerated in paragraph (b) of this section, who shall elect not to provide and pay compensation to any employe, according to the provisions of this act, it shall not be a defense, that: First, the employe assumed the risks of the employment; second, the injury or death was caused in whole or in part by the negligence of a fellow-servant; or third, the injury or death was proximately caused by the contributory negligence of the employe.

"(b) The provisions of paragraph (a) of this section shall only apply to an employer engaged in any of the following occupations, enterprises or businesses, namely:

"1. The building, maintaining, repairing or demolishing of any structure;

"2. Construction, excavating or electrical work;

"3. Carriage by land or water and loading and unloading in connection therewith;

"4. The operation of any warehouse or general or terminal store houses;

"5. Mining, surface mining or quarrying;

"6. Any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities;

"7. In any enterprise wherein molten metal, or explosive or injurious gases or vapors or inflammable

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vapors or fluids, or corrosive acids are manufactured, used, generated, stored or conveyed in dangerous quantities;

“8. In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employes or the public therein; each of which occupations, enterprises or businesses are hereby declared to be extra-hazardous.”

It is claimed that the business of the defendant, as described in the declaration, comes within the terms of clauses 3, 4, and 8. It seems very clear to us that the defendant was not, within the meaning of the statute, engaged in the “occupation, enterprise, or business” of “carriage by land or water,” etc. In one very broad sense, practically every manufacturer, business house, farmer and truck grower, as well as those engaged in almost innumerable other occupations, as an incident to his business, carries by land or water, and loads and unloads in connection therewith, but very clearly, “carriage by land or water” relates to those engaged in carriage as an “occupation, enterprise or business,” and not to those engaged in an occupation, enterprise or business to which carriage is an incident. (See *Uphoff v. Industrial Board of Illinois*, 271 Ill. 312.) What is said in regard to clause 3 applies with equal force to clause 4, for while the defendant may have used and maintained “warehouses or general or terminal store houses” in connection with its business, it certainly was not engaged in the business of operating them within the meaning of the statute.

Plaintiff claims also that defendant comes within clause 8, which covers any enterprise “in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safe-guarding of the employees or the public therein; each of which occupations, en-

terprises or businesses are hereby declared to be extra-hazardous.”

In passing upon this section of the act, the Supreme Court said, in *Uphoff v. Industrial Board of Illinois*, *supra*, at page 315:

“The intention of the law-makers is the law. This intention is to be gathered from the necessity or reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute if not also within the intention. When the intention can be collected from the statute, words may be modified or altered so as to obviate all inconsistency with such intention.”

Later, on page 317, the court continued:

“It is also plain that the Legislature only intended to include under paragraph (b) any such occupations, enterprises or businesses of the employer when they were properly considered to be ‘extra-hazardous.’ It is true that the clause in subdivision 8 of said paragraph (b) calling all of these trades, businesses, enterprises or occupations extra-hazardous was inserted for the purpose of making clear what was considered extra-hazardous, but it is also clear that the Legislature did not intend to include work that everyone knows is not extra-hazardous or even hazardous.”

Having in view the principle thus laid down by the Supreme Court, what is the meaning that must be given to clause 8? It is clear that even giving the words their broadest construction, it only includes those enterprises which were of such a character that the Legislature or a municipality had felt called upon to make provisions for the regulating, guarding, use or on placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein. As the purpose of the act itself was to provide compensation for personal injuries, the words

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“regulations for the protection and safeguarding of the employees or the public” as therein used can only mean protecting and safeguarding them from personal injury. It, therefore, clearly appears that the sanitary municipal regulations referred to in the declaration are in no way connected with the purpose of the act, and consequently cannot be held to bring within its scope enterprises that would otherwise not be included. The only other provisions of the municipal ordinances referred to, apply to all vehicles and operators of vehicles, whether used in any enterprise or not, and so cannot have the effect of bringing those who use vehicles within the terms of this 8th clause, intended to be descriptive of extra-hazardous occupations, enterprises or businesses.

We do not wish to be understood as attempting to lay down a hard and fast rule as to what this 8th clause of section 3 includes; we are of the opinion however that it does not include the operation, enterprise or business in which the defendant was engaged. The judgment of the lower court must, therefore, be reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, Defendant in Error, v. Fifty Cases Containing 30 Dozen Each, More or Less, of Shell Eggs. Perfection Egg Company, Claimant, Plaintiff in Error.

Gen. No. 21,171.

1. **Food, § 2*—how Pure Food Act construed.** The provisions of the Illinois Pure Food Act (Hurd's Rev. St., ch. 127b, J. & A. ¶ 10740 *et seq.*), are modeled after those of section 10 of the Federal Food and Drug Act, and the construction of the latter act by the United States Supreme Court is persuasive authority, and as the Illinois Legislature adopted the language of the Federal statute, it must be taken to have intended to use the language in the sense in which it had been construed.

2. **Food, § 2*—what constitutes holding article of for sale within Pure Food Act.** In proceedings for the condemnation of eggs seized under Hurd's Rev. St., ch. 127b (J. & A. ¶ 10740 *et seq.*), decomposed eggs, which claimant intends to subject to some renovating process and put upon the market in the form of a dried product, are held for sale within the meaning of such statute regardless of the condition or form the article is to be in at the time it is ultimately to be sold, or of the intention of the shippers in regard to such ultimate form.

3. **Food—when eggs are adulterated.** Although only a portion of the eggs in a case seized under Hurd's Rev. St., ch. 127b (J. & A. ¶ 10740 *et seq.*) may be decomposed and unwholesome, the case as a whole comes under section 8 of such act (J. & A. ¶ 10747), which states that food is adulterated "if it consists in whole or in part of * * * decomposed * * * animal or vegetable matter."

4. **Food—when within discretion of court to order inquest as to character of food.** In proceedings on a seizure of a case of eggs under Hurd's Rev. St., ch. 127b (J. & A. ¶ 10740 *et seq.*) where a portion of such eggs are not decomposed, the court may, to prevent hardship, order an inquest for the purpose of determining what eggs are good and turn them over to the claimant, but it is not required to do so.

5. **CONFLICT OF LAWS, § 31*—when claim that Federal law applicable because shipment interstate without merit.** Contention of claimant that shipment of eggs at point of destination in the original packages seized under Hurd's Rev. St., ch. 127b (J. & A. ¶ 10740 *et seq.*) was an interstate shipment and therefore not sub-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ject to the penalties imposed by the state law, *held* to be without merit.

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916.

LANNEN & HICKEY and FRANCIS O'SHAUGHNESSY, for plaintiff in error.

MACLAY HOYNE and JAMES MCCARTHY, for defendant in error; EDWARD E. WILSON and JAMES R. QUINN, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

This writ of error is sued out to reverse a judgment obtained by the People of the State of Illinois, condemning and confiscating fifty cases containing thirty dozen each, more or less, of shell eggs, obtained in a proceeding instituted under section 10 of "an act to prevent fraud in the sale of dairy products, and imitation or substitutes, to prohibit and prevent the manufacture and sale" of unhealthful, adulterated, or misbranded foods, etc., in force July 1, 1907, (Hurd's Rev. St., ch. 127b; J. & A. ¶ 10740 *et seq.*). The statute in effect, provides that any article of food, which is adulterated or misbranded within the meaning of the act, or which is made, labeled or branded contrary to the provisions of this act, or which does not conform to the definition of analytical requirements provided in this act, and is being sold or offered for sale or exposed for sale within the State of Illinois, shall be liable to be proceeded against in any court of record, or before any judge thereof, or before any justice of the peace, within whose jurisdiction the same may be found, and seized for condemnation and confiscation.

The complaint alleged that the shell eggs in question, "being an article of food, were and are adulterated in this, that the said eggs * * * consisted in whole or in part, of a filthy or decomposed or putrid, tainted or rotten animal * * * substance, and that the said eggs were then and there sold or offered for sale or exposed for sale within the State of Illinois," contrary to the statute.

The claimant defended on the ground that said eggs were not "held with intent to sell, offer for sale, expose for sale, or to be manufactured into a food product in manner and form as alleged in the complaint herein;" denied that said eggs more or less consisted in whole or in part of filthy, decomposed or putrid animal substance, and said that said cases contained a large percentage of good eggs, and that claimant was candling and sorting said eggs and separating the good from the bad and using only the good eggs.

On the trial, the evidence fully supported the contention of the State with reference to the condition of the eggs, although it appeared that some of the eggs were good. The evidence further disclosed that it was the apparent intention of the plaintiff in error, hereinafter referred to as claimant, to subject all or a portion of the unwholesome and partly decomposed eggs to some renovating process, and then put the dried product on the market. On this state of the record, the claimant seeks to reverse the judgment on the ground that the eggs were not being sold or offered for sale or exposed for sale within the State of Illinois within the meaning of the statute, and on the further ground that an entire case of eggs could not be confiscated upon proof that it contained a percentage of bad eggs. The provisions of the statute are modeled after those of section 10 of the United States Food & Drug Act, with the exception that section 10 of the statute provides for the seizure and condemnation of adulterated articles when they are "being transported

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from one State * * * to another for sale." It therefore follows that the construction placed upon this statute by the Federal courts, and particularly by the United States Supreme Court, is at least very persuasive authority when similar questions arise under our own statute. In *Hipolite Egg Co. v. United States*, 220 U. S. 45, certain cans of eggs which were being transported from one State to another were seized under the authority of section 10. The eggs were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business, which had shipped them from St. Louis to their own warehouses in Illinois. The evidence fully disclosed that the eggs were not to be sold in their original form, but were to be used in the baking business. It was therefore contended that the eggs were not shipped for sale within the meaning of the act. The court, after carefully considering this question, declared that "all articles, compound or single not intended for consumption by the producer, are designed for sale, and because they are, it is the concern of the law to have them pure." This is, in effect, a holding that an article of food that is not to be used by the producer is held for sale within the meaning of the statute, regardless of the state or condition or form the article may be in at the time it is ultimately sold. It would seem that there can be no doubt about the soundness of the conclusion of the court, for the legislative authority had very clearly indicated its intention that adulterated articles of food should not be transported for sale at all, no matter what the intention of the shippers might be in regard to the ultimate form that the articles might take. The language of the court is equally applicable to the case at bar. Had the Legislature elected to do so, it might have made an exception in favor of adulterated articles intended to be put through a renovating process, but it did not elect to do so, but chose instead to use comprehensive language identical with that contained in

the Federal statute. According to a well-established canon of construction, as it adopted the language of the Federal statute presumably with knowledge of the interpretation given it by the Supreme Court, it intended to use the language in the sense in which it had been construed. *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 377.

The claimant's second point, that the statute does not authorize the confiscation of an entire case of eggs upon proof that the case contains a certain or uncertain percentage of bad eggs, seems to the court to be without merit. If a case contains eggs which are adulterated within the meaning of the statute, the case as a whole comes within the 8th section of the statute (J. & A. ¶ 10747), which expressly says that food is adulterated "if it consists in whole or in part of filthy, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article," and this seems to the court a wise provision, for it would certainly destroy the effectiveness of the statute if immunity could be given by mingling one or more good eggs with others that were rotten.

This case is clearly distinguishable from one where a case of eggs, through circumstances beyond the control of the possessor, has in it some eggs that are bad, but where there is no evidence that such eggs are intended to be put upon the market in any form. In the case at bar there was ample evidence from which the jury could find that some, at least, of the eggs which came within the condemnation of the statute were held with an intent to sell them, within the meaning of the statute as hereinbefore defined.

Claimant also complains of the extra-judicial method by which the court separated the good eggs from the bad. As already indicated, we are clearly of the opinion that it was within the power of the court to condemn the cases of eggs on account of the presence of the so-called adulterated eggs which are shown to have

The People v. Fourteen Cases of Eggs, 198 Ill. App. 324.

been held for sale in violation of the statute. While the court might, to prevent hardship, order an inquest for the purpose of determining what eggs were good, and turn them over to the claimant, it was not required to do so, and therefore, the manner in which this was done is not one of which the claimant can complain.

Claimant's final contention that as there is a national food law, and as this was an interstate shipment remaining in the original package, it was not subject to the penalties imposed by the State law, is also without merit. The judgment of the Municipal Court will be affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Fourteen Cases Containing 30 Dozen Each, More or Less, of Shell Eggs. Perfection Egg Company, Claimant, Plaintiff in Error.

Gen. No. 21,181. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916.

Statement of the Case.

Condemnation proceedings by the People of the State of Illinois against Fourteen cases containing 30 dozen each, more or less, of shell eggs. Perfection Egg Company, claimant. From a judgment for plaintiff, claimant brings error.

The facts in this case are substantially the same as *People v. Fifty Cases Containing 30 Dozen Each, More or Less, of Shell Eggs, ante*, p. 319, and is governed by the decision in that case.

Meseke v. H. Piper Co., 198 Ill. App. 325.

LANNEN & HICKEY and FRANCIS O'SHAUGHNESSY, for plaintiff in error.

MACLAY HOYNE and JAMES MCCARTHY, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Charles Meseke, Appellee, v. H. Piper Company, Appellant.

Gen. No. 21,224. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. GEORGE BEDFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916.

Statement of the Case.

Action by Charles Meseke, plaintiff, against H. Piper Company, defendant to recover damages alleged to have been sustained by plaintiff's horse and wagon as a result of the running away of the team owned by defendant. From a judgment for plaintiff, defendant appeals.

Plaintiff's horse was hitched to a wagon and was standing on the north side of Madison street in the village of Forest Park, facing west. The team and wagon belonging to the defendant, in charge of a driver, was delivering bread in said village, and it being about noon, the driver drove the team into a shed, which was in a yard immediately adjoining Madison street. The shed was about forty or fifty feet inside of the yard.

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The yard was inclosed with a fence, there being two entrances to the same. The driver took the bridles off the horses and hung them on the hames, fed his team, and then went into a restaurant, which was situated near the yard, to eat his dinner. About five minutes thereafter, he looked out and the team was gone. In some manner not disclosed by the evidence, the team got out on Madison street and turned east, running away. They ran into plaintiff's horse and wagon. Plaintiff's horse was injured and parts of the wagon shafts broken. On account of the injuries the plaintiff was unable to afterwards use the horse. The value of the horse was placed by a witness on behalf of the plaintiff to be from \$100 to \$125, while a witness testified on behalf of the defendant that the horse was not worth to exceed \$50. There was also evidence as to other items of damage incurred.

THOMAS C. ANGERSTEIN, for appellant.

No appearance for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13a*—*what does not constitute variance between statement of claim and proof.* In a fourth-class case in the Municipal Court of Chicago for damages caused to plaintiff's horse and wagon by defendant's runaway team, where plaintiff's statement of claim averred that defendant's team and wagon were left "unattended, unhitched and unguarded," and the evidence was contended to be in fatal variance therewith in showing only that the team was left unattended and unhitched, such contention held to be without merit.

2. NEGLIGENCE, § 187*—*when evidence sufficient to sustain finding as to negligence in driving team.* In an action for damages to plaintiff's horse and wagon by defendant's runaway team, evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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held sufficient to sustain a finding as to negligence of the driver of defendant's team.

3. NEGLIGENCE, § 164a*—*when evidence as to gentle disposition of horse inadmissible.* Where plaintiff in action for damages caused to his horse and wagon by defendant's runaway team offered evidence as to the gentle disposition, etc., of his team, such evidence was properly refused, plaintiff not claiming that the horses were other than gentle, but basing his action on the negligence of defendant on the control and management of the team.

Baltimore & Ohio Chicago Terminal Railroad Company, Appellee, v. Illinois Brick Company, Appellant.

Gen. No. 21,282. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by the Baltimore & Ohio Chicago Terminal Railroad Company, plaintiff, against Illinois Brick Company, defendant, to recover unpaid freight charges of \$9 per carload on 156 carloads of brick, hauled by plaintiff for defendant from Blue Island, Illinois to Chicago. From a judgment for \$1,669.46 in favor of plaintiff, defendant appeals.

It was not disputed that the rate charged was reasonable and in compliance with the schedules filed with the Interstate Commerce Commission and the Railroad and Warehouse Commission of Illinois, and was less than the maximum rate as fixed by the said railroad and warehouse commission. The defense was that the plaintiff during the month of August, 1911, hauled brick from Chicago Heights, Illinois, to Chicago, a dis-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

B. & O. Chicago Term. R. Co. v. Illinois Brick Co., 198 Ill. App. 327.

tance of thirty miles, for \$5.50 per carload, over the same track as that on which it hauled the brick for the defendant from Blue Island to Chicago, a distance of but eighteen miles, for which plaintiff charged the defendant \$9 per carload; that this was unjust discrimination and contrary to law, and that the defendant should not be required to pay more than that charged by the railroad company for hauling from Chicago Heights, \$5.50 per carload and that therefore plaintiff's claim for \$1,447.34 is excessive in the sum of \$478.

In 1898 the railroad company entered into a written contract with a land association of Chicago Heights whereby the association conveyed land to the railroad company for right of way and for other purposes, in consideration of which the railroad company agreed that its freight charges for hauling carload lots from Chicago Heights to Chicago should, for a period of 99 years, be \$5.50 per carload.

In 1910, when it attempted to raise the freight charges from Chicago Heights to Chicago, it was enjoined by the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, from doing so, which injunction was still in full force and effect, the court holding said contract to be valid and binding.

FELSENTHAL & WILSON, for appellant; DAVID LEVINSON, of counsel.

JESSE B. BARTON, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 218*—*when evidence insufficient to establish unjust discrimination in freight rates.* In an action by one carrier against another to recover unpaid freight charges for hauling cars on plaintiff's railroad, defense of unjust discrimination in freight rates charged defendant *held* not to be established by the evidence.

2. INTEREST, § 82*—*when objection to allowance of interest may not be raised on appeal.* Objection to the allowance of interest on plaintiff's claim not having been presented to the trial court, the question cannot be raised in a court of review.

Maud Louthan, Administratrix, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,347.

1. STREET RAILROADS, § 97*—*when contributory negligence of driver of team passing in front of car question for jury.* In an action against a street car company for death of plaintiff's intestate where defendant contended that plaintiff's intestate was guilty of contributory negligence in swinging his team across defendant's tracks at such a short distance in front of the car that it was physically impossible to prevent the collision, and where there was a conflict in the evidence with regard to such distance, *held* that the contributory negligence of plaintiff was a question for the jury.

2. NEGLIGENCE, § 198*—*when contributory negligence of plaintiff question for jury.* If there be any difference of opinion on the question of contributory negligence, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury.

3. APPEAL AND ERROR, § 1401*—*when judgment will not be reversed on appeal.* A court of review will not reverse a judgment unless it can say that the verdict is against the manifest weight of the evidence.

4. STREET RAILROADS, § 131*—*when evidence sufficient to sustain finding that defendant guilty of negligence.* In an action against a street railroad for the death of a person killed while attempting to drive a team across defendant's tracks in front of an approaching

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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car, evidence *held* insufficient to sustain a finding that defendant was guilty of negligence.

5. STREET RAILROADS, § 141*—*when instruction on superior right of way of street car company properly refused.* An instruction on the superiority of right of way of the street car along its right of way over vehicles traveling in same direction is properly refused as inapplicable to a case where a driver was attempting to cross the track and where the question was not one of superior right to the use of the street but was purely as to whether defendant was guilty of negligence and the driver exercised ordinary care.

6. STREET RAILROADS, § 144*—*when instruction not objectionable as limiting the exercise of due care of deceased to precise time of crossing street car tracks.* Where an instruction that if plaintiff has proven his case as alleged in his declaration by a preponderance of the evidence, the jury should find defendant guilty, which was objected to on the ground that the allegations of the declaration limited the exercise of due care and caution on the part of deceased to the precise time when he was crossing the tracks of defendant street car company, *held* that the objection was tenable as to the first count but was not tenable as to the three additional counts, and that the court committed no error in giving such instruction.

7. NEGLIGENCE, § 226*—*when instruction on exercise of ordinary care not erroneous.* In an action for the death of a person who was killed while attempting to drive across a street car track in front of an approaching street car, an instruction defining ordinary or reasonable care *held* not unobjectionable on ground that it assumed that an ordinarily careful man would permit himself to be surrounded by the same circumstances that surrounded the deceased.

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 15, 1916. *Certiorari* denied by Supreme Court (making opinion final).

FRANKLIN B. HUSSEY and CHARLES LE ROY BROWN, for appellant; JOHN R. GUILLIAMS, of counsel.

GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appellee (plaintiff) brought an action against the appellant (defendant) for damages on account of the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The jury returned a verdict for \$6,250 in favor of the plaintiff, upon which judgment was entered. To reverse this judgment, defendant prosecutes this appeal.

The deceased was in the teaming business, and on the day of the accident, December 9, 1910, was engaged in hauling brick from a building which stood on the north side of Twenty-second street and about 50 feet east of the P., Ft. W. & Co. Railway viaduct. Twenty-second street extends east and west in the City of Chicago, and is occupied by two street car tracks upon which defendant operates its cars. The street cars pass under the tracks of said railroad, which cross Twenty-second street from north to south at a point about 280 feet west of Archer avenue, which is the first street east of the viaduct which crosses Twenty-second street. The railroad tracks are elevated, and the roadway of Twenty-second street is depressed, passing under the railroad in a subway. The depression of Twenty-second street begins at a point about 50 feet west of Archer avenue and continues to the viaduct or subway. The incline is 230 feet in length and the grade 3.1 per cent. In the center of the subway and between the two car tracks is a row of pillars running from east to west supporting the railroad tracks. At the subway the roadway of Twenty-second street is about 42 feet wide.

About noon, December 9, 1910, a team and wagon belonging to the deceased was standing at the north curb of Twenty-second street, facing west, in front of the building that was being wrecked. The wagon was loaded with about 2,000 brick, weighing about four tons. The brick were to be hauled east in Twenty-second street. The evidence tends to show that the deceased asked the driver of the team whether he could

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make the turn east of the viaduct, and there being some doubt of the driver's ability in this regard, the deceased got on the wagon to make the turn; that as he did so he and the driver both looked east to ascertain whether a car was approaching. The deceased got on the wagon, started to make the turn, and when the front wheels of the wagon were about over the south rail of the north or westbound track, one of the defendant's cars coming from the east struck the wagon between the two wheels. The deceased was thrown off the wagon, caught between the wagon and the east pillar that supported the railroad tracks, and instantly killed. At the time of his death he was thirty-two years old and left him surviving his widow, the plaintiff.

The defendant's first contention is that recovery is barred by the contributory negligence of the deceased, the argument being that the deceased negligently swung the team across the tracks at such a short distance in front of the car that it was physically impossible for the defendant to prevent the collision; that the physical facts and mathematical computation demonstrate that the distance between the car and wagon was too short to enable the car to be stopped; that "the controlling question in this case is the distance that intervened between the car and the wagon at the time the horses swung to the south." We agree that the controlling question is as stated by the defendant. Both parties have made elaborate analysis of the evidence, and we have carefully examined all the evidence in the record. The distance between the car and the wagon at the time in question is variously estimated by the witnesses from 12 to 15 feet as stated by the motorman to 380 feet by the witness Wilson. Other witnesses put the distance at 20 or 25 feet; others at the top of the incline, which was shown by actual measurement to be 230 feet; others that the street car was about the middle of the incline, which they esti-

mated to be about 20 or 25 feet, when the team swung across the track. This testimony shows that estimates made by the witnesses as to the distance between the car and the wagon, when stated in feet, is exceedingly inaccurate and very unreliable. The evidence shows that the car could be stopped within 35 or 40 feet.

As a general proposition, the question of contributory negligence is one of fact for the jury, and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. *Bale v. Chicago Junction Ry. Co.*, 259 Ill. 476; *Chicago Union Traction Co. v. Jacobson*, 217 Ill. 404; *Patterson v. Chicago City Ry. Co.*, 195 Ill. App. 527. From a careful consideration of all the facts and circumstances as shown by the record, we are clearly of the opinion that the question of contributory negligence of the deceased was properly submitted to the jury.

The defendant next contends that the clear preponderance of the evidence shows that the defendant was guilty of no negligence. A court of review will not reverse a judgment unless they can say that the verdict is manifestly against the weight of the evidence. The jury saw and heard the witnesses and found the issues for the plaintiff; the trial judge also saw and heard the witnesses and approved the verdict of the jury. We have carefully examined all the evidence in the record and cannot say that the verdict is manifestly against the weight of the evidence.

The defendant next contends that the court erred in refusing to give instruction No. 1, offered by the defendant. The instruction, in substance, was that by reason of its convenience to the public as a carrier of passengers, and the inability of its cars to turn out, a street railway company is vested with a superior

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right of way over other vehicles, over that portion of the street occupied by its tracks at points other than street intersections. To sustain this contention, reliance is chiefly placed upon the case of *North Chicago Elec. Ry. Co. v. Peuser*, 190 Ill. 67. In that case plaintiff was driving in the street car track, a car was coming from behind, and the gong was sounded repeatedly. Plaintiff failed to turn out of the track in time and the vehicle in which he was riding was struck by the car. The instruction refused in that case was that the street car company, as a carrier of passengers and by reason of the inability of its cars to turn out, was vested with a superior right of way over other vehicles; that it was the duty of the drivers to turn out and allow the cars to pass, and "to use care not to obstruct and delay the same." The court there considered the relative rights of the parties where the driver of the vehicle was traveling longitudinally in the track in front of the car, and what was said there does not apply where the driver was attempting to cross the track, as in the case at bar. *Springfield Consol. Ry. Co. v. Gregory*, 122 Ill. App. 607; *Pattison v. Chicago City Ry. Co.*, *supra*. In *North Chicago St. R. Co. v. Smadraff*, 189 Ill. 155, it was held that it was not true that street cars under all circumstances have a superior right of way over that portion of the street occupied by its tracks, except at street intersections, but that a street car company generally has a superior right of way at such places; that the question was not one of superior right to the use of the street but purely as to whether the defendant was guilty of negligence and the plaintiff in the exercise of ordinary care. This was the question in the case at bar and the instruction was therefore properly refused.

The next contention is that the court erred in instructing the jury that if they found from the evidence and under the instructions that the plaintiff had proven her case as alleged in her declaration by a

preponderance of the evidence, they should find the defendant guilty. In support of this contention, the defendant argues that the allegations of the declaration limit the exercise of due care and caution on the part of the deceased for his own safety to the precise time when he was crossing the street car track. The declaration consists of four counts. In the first count the allegation of care and caution is: "While the said Frazier Louthan with all due care and caution for his own safety was then and there driving his team of horses and wagon in a southerly direction over and across the westbound tracks," and in each of the three additional counts, the allegation is: "While the said Frazier Louthan was exercising all due care and caution for his own safety was then riding in a certain wagon drawn by two horses and driving the same across the track on the aforesaid street and highway." The objection to the allegations of the three additional counts is not tenable. *St. Louis Nat. Stock Yards v. Godfrey*, 198 Ill. 288; *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614; *Pusateri v. Chicago City Ry. Co.*, 156 Ill. App. 578; *Larsen v. Ward Corby Co.*, Gen. No. 20,985, *ante*, p. 109. The first count, however, is subject to the objection. The question therefore is, was the giving of the instruction error? The defendant to sustain its contention cites *Krieger v. Aurora, El. & C. Ry. Co.*, 242 Ill. 544; *Cromer v. Borders Coal Co.*, 246 Ill. 451; *Cantwell v. Harding*, 249 Ill. 354; *Bale v. Chicago Junction Ry. Co.*, 259 Ill. 476.

In the *Krieger* case, *supra*, an instruction was given similar to the one here complained of. It was then held that while the practice of giving such an instruction was not commendable, yet it was generally held not ground for reversing the judgment. The court there said, p. 550: "In *Central Railway Co. v. Banister*, 195 Ill. 48, and *West Chicago Street Railroad Co. v. Lieserowitz*, 197 Id. 607, the instruction was held unobjectionable on the theory that it was the same as

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if the allegations of the declaration had been copied into the instruction. In those cases the court said that had the instructions copied the allegations of the declaration no objection could have been urged to them. The theory in the cases in which the instruction has been held unobjectionable is that it merely refers the jury to the declaration to ascertain what facts are averred and orders a verdict if such facts have been proved. Considering the instruction the same as though it copied the averments of the declaration in this case, the allegation respecting care and caution on the part of the plaintiff in each count was the same, and was in the following words: 'While the said plaintiff with all due care and caution was then riding across the said railroad.''' It was there held that, as the real controversy was over the questions whether the plaintiff could have seen or heard the car or the signals, which were alleged to have been given, before driving on the track, and whether he was guilty of negligence in placing himself in the position of danger, the instruction was bad. In that case it will be noticed that all counts of the declaration were the same and limited the exercise of due care and caution to the time when the plaintiff was riding across the track, while in the case at bar, the allegations of the three additional counts do not so limit such period of time.

In the *Cromer* case, *supra*, the declaration consisted of but one count. One of the defenses interposed was that of assumed risk, and as the declaration did not expressly nor by fair implication negative such defense, it was held error to give an instruction similar to the one now under consideration.

The *Cantwell* case, *supra*, was an action based on fraud and deceit. There were two special counts, the first of which failed to allege scienter. One of the instructions told the jury that if they believed from the evidence that the plaintiff had made out his case, as laid in the declaration, "or any count thereof," they

must find for the plaintiff. This was held to be error, since the jury might have found the defendant guilty on the first special count.

In the *Bale* case, *supra*, there were four counts in the declaration. The allegation of the first count limited the exercise of due care to the time the deceased was in the place where he was struck by the train. The contention of the defendant there was that the deceased was guilty of negligence in placing himself in that position when he knew the train was approaching. The instruction told the jury that if they believed from a preponderance of the evidence that the plaintiff had proved his case as "alleged in the first, second or fourth counts of his declaration, or either of them," then they should find the defendant guilty. This was held to be error since the first count ignored the question whether the deceased was guilty of negligence in placing himself in a dangerous position.

From the foregoing it clearly appears that none of the cases cited is in point. In the case at bar, the allegations of the three additional counts do not limit the exercise of due care to the period of time when the deceased was crossing the tracks, and it will be noticed that the instruction did not authorize a recovery on proof of the allegations of any particular count, but told the jury that the plaintiff must prove her case by a preponderance of the evidence as alleged in her declaration. Under these facts, we are of the opinion that the court committed no error in giving the instruction.

The defendant next complains that the court committed error in giving instruction No. 6, offered on behalf of the plaintiff. This instruction defined ordinary or reasonable care, and the defendant concedes that as an abstract proposition of law it is unobjectionable, but contends that as applied to the facts in this case it was erroneous in that it assumed that an ordinarily careful man would permit himself to be surrounded by

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the same circumstances that surrounded the deceased. This contention is without merit.

Finding no reversible error in the record, the judgment of the Superior Court of Cook county will be affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Cassius M. Carr, Plaintiff in Error.

Gen. No. 21,559.

1. DENTISTS, § 2*—*when person may not practice dentistry without license.* Under Hurd's Rev. St. ch. 91 (J. & A. ¶ 7433 *et seq.*), a person may not practice dentistry without a license unless he comes within one of the exceptions made by the statute itself.

2. DENTISTS, § 2*—*what constitutes practicing dentistry without a license.* Where defendant, in an information charging him with unlawfully practicing dentistry without a license, had no such license but taught particular methods of treating dental diseases and demonstrated on patients furnished by his students, and charged such students \$175 for instruction and demonstration but did not charge the patients for such work, *held*, under all the evidence, that he was practicing dentistry without a license within the meaning of Hurd's Rev. St. ch. 91 (J. & A. ¶ 7433 *et seq.*).

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed March 15, 1916.

DARROW, BAILEY & SISSMAN, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Plaintiff in error, hereinafter called the defendant, was prosecuted upon an information, filed on behalf of the Illinois State Board of Dental Examiners, charging him with unlawfully practicing "dentistry, dental surgery, and other branches thereof, without first applying for and obtaining a license for such purpose from the Illinois State Board of Dental Examiners," in violation of the Act to Regulate the Practice of Dental Surgery and Dentistry. From a judgment of conviction of the Municipal Court of Chicago, imposing a fine of \$50, he prosecutes this writ of error. The case was tried before the court, a jury having been waived. There is little dispute as to the facts. The evidence tends to show that the defendant was admitted to practice dentistry in Utah in 1894; that in May, 1914, he established and conducted in Illinois what he designates as "C. M. Carr's School of New Dentistry," his place of business being No. 30 North Dearborn street, Chicago; that he was still conducting the same at the time of the trial; that the defendant had invented a set of instruments (one hundred and fifty in number) which he used in the work; and that he had recently been awarded a patent covering these instruments. It is claimed that the instruments were superior to other instruments in use, especially in the treatment of pyorrhea. The course pursued in said school consisted of an explanation and demonstration of the use of said instruments; also instruction as to the proper care of the instruments. At the time of the trial about sixty-three students, all of whom were dentists regularly licensed to practice in Illinois had received instruction in defendant's school. Each of these students was required to pay the defendant \$175 tuition and \$175 for a set of the instruments.

The method of instruction adopted by the defendant was: After teaching the student how to keep each of said instruments in proper condition, the student would bring in one of his patients. The defendant

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would then, in the presence of the student, strip, scrape, plane, polish and grind the teeth of the patient, demonstrating, as defendant states, to the student the use of the instruments. The greater part of the work, however, was done on the teeth of the different patients, by the dentists, or students, themselves. For this instruction and demonstration the defendant charged each dentist \$175. None of the several patients paid anything to the defendant for this work.

Section 3, ch. 91 Rev. St. (J. & A. ¶ 7435), provides that no person shall begin the practice of dentistry or dental surgery or any branch thereof, without first applying for and obtaining a license for such purpose from the Illinois State Board of Dental Examiners. Section 5 (J. & A. ¶ 7437) of the same act provides: "Any person shall be regarded as practicing dentistry or dental surgery within the meaning of this act, who shall treat or profess to treat any of the diseases or lesions of human teeth or jaws, * * *: Provided * * * this act shall not prevent students from performing dental operations under the supervision of competent instructors within a dental school, college, or dental department of a university recognized by the Illinois State Board of Dental Examiners." Section 16 (J. & A. ¶ 7448) of the same act provides that any person who shall practice dentistry without first obtaining a license for that purpose, shall, upon conviction, be fined for each offense not less than \$50 nor more than \$200.

There is contention that defendant's school has been recognized by the State Board of Dental Examiners, as provided by said section 5, and it is conceded that he has no license to practice dentistry in this State. The defendant contends that he is not practicing dentistry, but that he is teaching "particular methods of treating dental diseases," which he designates as "preventive dentistry" and that practicing dentistry within the meaning of the statute implies the practic-

ing of the same for compensation; that he does not receive compensation for the work he does on the teeth of the patients, and that he has not, therefore, violated any law of this State.

Under our statute a person may not practice dentistry without a license, unless he comes within one of the exceptions made by the statute itself. If it be conceded that what the defendant did was done solely for the purpose of teaching the use of his instruments and his "particular method of treating dental diseases," this, under all the facts shown by the evidence, would not bring him within any exception made by the statute. Nor do we think that the fact that he did not receive any compensation, if such were the fact, would do so, if the work he did actually constituted practicing dentistry as defined by the statute. We think, however, that the evidence clearly shows that he did receive compensation for what he did.

The statute expressly states what shall constitute practicing dentistry, and whether the defendant was practicing dentistry, within the meaning of the statute, was a question to be determined from what he did and not what he designated his acts to be. After a careful consideration of all the evidence in the case, we are clearly of the opinion that the defendant was practicing dentistry without a license, within the meaning of the Act to Regulate the Practice of Dental Surgery and Dentistry. The judgment of the Municipal Court of Chicago will therefore be affirmed.

Affirmed.

The People v. Siems et al., 198 Ill. App. 342.

The People of the State of Illinois ex rel. Edward A. Schutt, Plaintiff in Error, v. Ludwig Siems and Meta Siems, Defendants in Error.

Gen. No. 21,677. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded with directions. Opinion filed March 15, 1916. Rehearing denied and opinion slightly modified March 23, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Habeas corpus on the relation of Edward A. Schutt, plaintiff, against Ludwig Siems and Meta Siems, respondents, for the custody of plaintiff's child. From an order quashing the writ and dismissing the petition, the relator brings error.

The infant child involved in this controversy was the daughter and only child of the relator, and the granddaughter of the respondents. The relator was a man about thirty-two years of age, residing in the Village of Laporte, Minnesota, in which State he resided practically all of his life. On February 25, 1911, he was married to the daughter of the respondents at Kenosha, Wisconsin. Respondents' daughter and the relator were cousins of the first degree, and prior to said marriage she lived with her parents in Chicago. She visited the relator and other relatives in Minnesota and there became engaged to marry the relator. Afterwards the relator came to Chicago to be married, but found that the law of this State prohibited marriages between cousins of the first degree. Thereupon he, together with the respondents and said daughter, proceeded to Wisconsin where the marriage ceremony was performed. They all immediately returned to Chicago, and within a day thereafter the re-

lator and his wife went to their home in Minnesota, where they continued to live together as husband and wife until April 10, 1914, when she died. Vivian Dorothy Schutt, the child in question, was the only child born to relator and his wife and was about two years old when her mother died. She was not very strong physically, and about three weeks after her mother's death was taken to the home of the respondents in Chicago, where she lived at the time of these proceedings.

About December 11, 1914, relator was notified by publication that respondents had filed a petition in the County Court of Cook county for the adoption of said child. December 24, 1914, relator visited the respondents and the child, and on the 28th of the month demanded that the respondents deliver to him his child, which they refused to do. Thereupon the petition in this case was filed.

The respondents contended that the custody of the child was turned over to them by agreement "so that they could raise her to maidenhood, the father, however, to have the right to visit said child at reasonable times;" that this was done at the dying request of the child's mother; that she was well taken care of and had a good home in Chicago, and that it is to the best interests of said child that she stay with respondents.

There was evidence to show that respondents were able to furnish the child with a more comfortable home than relator. The evidence tended to show that relator was very fond of his child and that he did not intend in any way to surrender any of his rights by turning her over to respondents; that he was a strong healthy man, was a carpenter and contractor, and engaged in the lumber business; that he had held positions of public trust such as assessor, member of the village council, etc.; that he was honest and industrious, and had no bad habits; that he had had some financial reverses

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occasioned by the destruction by fire of relator's lumber yard and was indebted in several small sums; that he was earning about one hundred dollars per month; and that he had arranged with a family living in Minnesota to take care of himself and child. Respondents further contended and the court found that the relator and his wife were married in Wisconsin to evade the laws of Illinois; that the marriage was incestuous and void *ab initio*; that the respondents were proper persons to have the custody of the infant child, and that it was for the child's best interest to be remanded to their custody.

WILLIAM C. HARTBAY and C. HELMER JOHNSON, for plaintiff in error.

GORMAN, POLLOCK & LIVINGSTON, for defendants in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. PARENT AND CHILD, § 3*—*when parent entitled to custody of child.* The parent has the right to the custody of his child as against the world unless he has forfeited his right, or the welfare of the child demands that he be deprived of it.

2. PARENT AND CHILD, § 2*—*what is controlling element as to custody of child.* The controlling element with reference to the custody of a child is the welfare of the child, and this is not to be determined solely from the financial standing of the parties.

3. MARRIAGE, § 2*—*what law determines validity of marriage in foreign State.* The legality of a marriage taking place in a foreign State, when questioned in Illinois, is to be adjudged by the laws of the foreign State, except where the marriage is in violation of some positive law of this State.

4. MARRIAGE, § 2*—*where marriage contracted in foreign State recognized.* Relator in habeas corpus proceedings for the custody of his daughter who had married his first cousin, the mother of such daughter, in Wisconsin, and returned with her thereafter to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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his home in Minnesota, contracted a valid and binding marriage even though the laws of Illinois, which had been the home of his wife and whence he had taken her to Wisconsin, prohibit such a marriage.

5. INFANTS, § 4*—*when evidence sufficient to sustain award of custody of child to father in habeas corpus proceedings.* In a habeas corpus proceeding by a father residing in another State to procure the custody of his child which was left with the maternal grandparents in this State after the death of the mother, evidence held sufficient to sustain an award of the custody of the child to the father.

**Mary Kraus, Defendant in Error, v. National Council,
Knights and Ladies of Security, Plaintiff in Error.**

Gen. No. 21,420. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed March 27, 1916.

Statement of the Case.

Action by Mary Kraus, plaintiff, against National Council, Knights and Ladies of Security, defendant, on a benefit certificate issued by defendant on the life of Julia Kraus, plaintiff's mother. From a judgment in favor of defendant for \$954, plaintiff brings error.

This case involves facts substantially like those involved in *Neenan v. National Council, Knights and Ladies of Security*, 188 Ill. App. 490. Description of the plan of insurance, with benefit certificates and by-laws of the defendant material to the point in the instant case, may be found in the opinion filed in that case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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By defendant's by-laws it was provided that:

"All assessments for every month shall become due and payable on the first day of the month. The certificate of each member who has not paid such assessment or assessments and dues on or before the last day of the month, shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the Council or any officer thereof, or of the National Council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited. No right under such certificate shall be restored until it has been duly reinstated by the member complying with the laws of the Order, with reference to reinstatement."

It was also provided that a member might be reinstated by payment within sixty days from date of suspension of all arrearages, "provided, however, That he be in good health at the time of making payment * * *; Provided, further, That the receipt and retention of such assessments or dues, in case the suspended member is not in good health * * * shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his Benefit Certificate."

Decedent's assessment for September, 1912, was not paid during that month, whereby under the automatic operation of the by-laws she became suspended, and subsequent payment would operate to reinstate her only on condition that at the time of such payment she was "in good health." A payment was made on October 7, 1912. There was evidence that on October 7, 1912, decedent was afflicted with mitral regurgitation—a valvular disease of the heart—and that she had been under the care of a physician for this disease for several months prior thereto; that because of this disease and its consequences she was confined to the house for some eight months before her death; that the disease progressed, with the usual dropsical conditions, until it caused her death.

Trafton v. National Council, K. & L. of Security, 198 Ill. App. 347.

A. W. FULTON, for plaintiff in error.

JOSEPH M. CONNERY, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE, § 906***—*when evidence sufficient to show that member of fraternal insurance society not in good health at time of attempted reinstatement.* In an action on a benefit certificate in a fraternal insurance society on account of the death of plaintiff's mother, the evidence *held* sufficient to show that decedent who was automatically suspended from membership on account of nonpayment of dues, at the time of her attempted reinstatement by payment of delinquent dues, was not in good health so as to be entitled to reinstatement.

2. **INSURANCE, § 782***—*when member of fraternal insurance society automatically suspended.* Suspension of member of fraternal insurance society for nonpayment of dues, *held* to have operated automatically and without necessity of order by such society.

**George L. Trafton, Guardian, Defendant in Error, v.
National Council, Knights and Ladies of Security,
Plaintiff in Error.**

Gen. No. 21,681. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed March 27, 1916.

Statement of the Case.

Action by George L. Trafton, as guardian of Alfonso, Louise and Jennie Cadamartrie, plaintiff, against Na-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Trafton v. National Council, K. & L. of Security, 198 Ill. App. 347.

tional Council, Knights and Ladies of Security, defendant, on a benefit certificate issued to Flora Cadamartrie. From a judgment in favor of plaintiff for \$967.50, defendant brings error.

This case in its general features and as to the question involved is similar to the case of *Kraus v. National Council, Knights and Ladies of Security*, ante, p. 345, and *Neenan v. Same*, 188 Ill. App. 490. Reference is made to the opinions in these cases for description of the character of the benefit certificate and the by-laws.

The defense in this case was that the insured did not pay the assessment under the certificate for the month of July, 1913, before the last day of the month, and for that reason, under the by-laws, she became suspended, and that on August 26, 1913, when she paid the July and August assessments, she was not in good health, a condition necessary to reinstatement.

It was proved that on August 28, 1913, the insured was suffering from a tumor of the uterus, with pressure symptoms which in the opinion of her physician, required the removal of the tumor. Upon his advice she was taken to a hospital and on August 30th an operation was performed removing the tumor and also the uterus, fallopian tubes and ovaries. The tumor was about the size of a fist. The doctor describes it as "quite a large tumor." It is also not controverted that this tumor had been growing for a period of at least several months prior to this time. Immediately after the operation her heart began to fail, the doctor testifying, "there was a weak heart-muscle, the heart wasn't strong enough to carry her along during the convalescence." She died on September 2nd. There was testimony to the effect that she appeared to be in good health on August 26th.

It was contended that the by-laws were not properly introduced in evidence. They were certified under

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the hand of the national secretary, with the seal of the society affixed.

It was also contended that the defendant waived the provision of the by-laws with reference to good health when the financier of the society accepted the assessment on August 26th.

A. W. FULTON, for plaintiff in error.

J. MARION MILLER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 906*—*when evidence sufficient to establish that member of fraternal order not in good health at time of attempted reinstatement.* In an action on a benefit insurance policy, evidence held to show that insured, who had failed to pay an assessment for one month and was thus automatically suspended under the rules of the order, was not in good health during the following month at the time of an attempted reinstatement by the payment of the delinquent assessment, and that she was accordingly not a member of such society in good standing at the time of her death.

2. INSURANCE, § 906*—*when evidence sufficient to sustain finding that member of beneficial order not in good health.* Evidence that decedent was suffering from a tumor of the uterus, held to prove that she was not in good health.

3. INSURANCE, § 807*—*what constitutes good health within rules of fraternal society as to reinstatement.* The words "good health" in the rules of a fraternal insurance society with reference to reinstatement of a member mean that a person is in a reasonably good state of health and free from any disease or illness that tends seriously or permanently to weaken or impair the constitution, and such words do not refer to the appearance of good health.

4. EVIDENCE, § 250*—*when by-laws of fraternal society admissible in evidence.* By-laws of a fraternal insurance society, certified under the hand of the national secretary and with the society's seal affixed, were properly introduced in evidence, in compliance with Hurd's Rev. St. ch. 51, sec. 15 (J. & A. ¶ 5532).

5. INSURANCE, § 807*—*when acceptance of delinquent assessment does not operate to reinstate member of beneficial society in poor*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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health. Where there is evidence that the "financier" of a fraternal insurance society accepted an assessment which would operate to reinstate decedent in membership in such society providing she was in good health, but there is no evidence that such "financier" knew that she was not in good health, such acceptance did not operate to reinstate decedent, and there is no liability upon her benefit certificate in such society.

Charles M. Johnson, Defendant in Error, v. Clarence H. Morgan and Ira S. Ferguson, Plaintiffs in Error.

Gen. No. 21,531. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN C. WORK, Judge, presiding. Heard in this court at the October term. 1915. Reversed. Opinion filed March 27, 1916.

Statement of the Case.

Action by Charles M. Johnson, plaintiff, against Clarence H. Morgan and Ira S. Ferguson, defendants, for damages on account of defendants' breach of contract to convey land to plaintiff. From a judgment for \$317.50 in favor of plaintiff, defendant Morgan brings error.

Ferguson was not served with summons, and suit proceeded by trial by the court to judgment for \$317.50 against Morgan, who seeks reversal. An order severing Ferguson and permitting Morgan to prosecute his writ of error alone was entered in the Appellate Court.

By his statement of claim plaintiff averred that defendants made a contract with him to deliver and convey certain land in Washburn County, Wisconsin, for a consideration of \$300 which plaintiff paid, but defendants breached this contract and have failed and refused to deliver and convey the land, to the damage of plaintiff.

Plaintiff testified that he met Ferguson "and talked to him in regard to some lots at Long Lake in Washburn County, Wisconsin." This was the only evidence as to any contract. Plaintiff then introduced a warranty deed whereby defendants conveyed to plaintiff a number of lots in Washburn County, Wisconsin. The deed appeared to be in proper form and was duly delivered to plaintiff. Plaintiff then said that he sent the deed to be recorded to the registrar of deeds of Washburn County, Wisconsin, but it was returned with a letter from the registrar which said that the plat of the property mentioned in the deed had not been recorded.

The lots conveyed by the warranty deed were described as in certain blocks in "Orielle Park, a subdivision," etc. At the date of the delivery of the deed there was a subdivision, duly platted into blocks and lots, of that name. The lots mentioned in the warranty deed could be readily identified and located from this plat. It appeared that defendants supposed this plat had been recorded in the office of the registrar, but such was not the fact. It did appear that prior to this suit the tract called Orielle Park had been replatted under another name, which latter plat had been recorded; that the blocks in this later plat were of the same size and numbered identically as the blocks of the Orielle Park plat, and that the lots mentioned in the deed could be identified and located on this later plat. A deed conveying to plaintiff these lots by more definite description in accordance with the later plat was offered for delivery to plaintiff provided he should withdraw his suit.

BROWN, BROWN & BROWN, for plaintiffs in error.

HARRIS, KAGY & VANIER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Dolan v. Loker, 198 Ill. App. 352.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 352***—*when evidence insufficient to establish breach of contract to convey land.* In a suit for damages on account of defendants' breach of contract to convey land to plaintiff, where a deed appearing to be in proper form was executed and delivered to plaintiff, evidence *held* insufficient to establish a breach of the contract.

2. **VENDOR AND PURCHASER, § 352***—*when letter from registrar of deeds in State in which land located inadmissible.* Letter from registrar of deeds in another State in which he said that the plat of the property mentioned in deed which was returned therewith, had not been recorded, *held* not to be competent evidence in an action for breach of contract to convey the land described in such deed.

3. **VENDOR AND PURCHASER, § 352***—*when unrecorded plat admissible in action for breach of contract to convey land.* An unrecorded plat of a subdivision of land whereon lots alleged to have been conveyed to plaintiff could be identified, *held* competent evidence in suit for breach of contract to convey such lots and to have been improperly stricken from the record.

Thomas C. Dolan, Defendant in Error, v. Harry A. Loker, Plaintiff in Error.

Gen. No. 21,588. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Action by Thomas C. Dolan, plaintiff, against Harry A. Loker, defendant, for rent. From a judgment in favor of plaintiff, defendant brings error.

There was evidence that on February 25, 1913, Jacob C. Paquet was the owner of an apartment building in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chicago, and on that date entered into a written lease with the defendant for an apartment, the term beginning May 1, 1913, and extending until April 30, 1914, the rent to be \$42.50 per month. Subsequently, in April, 1913, Paquet sold the property to plaintiff, Dolan, and Loker's lease was assigned to plaintiff. J. M. McDonald appeared to have been acting as collector for Paquet, and he collected some rents for a short time after plaintiff became the owner of the building. Defendant said that on June 14, 1913, by agreement with plaintiff his lease was canceled and a new lease entered into expiring September 30, 1913, and as evidence of this he produced what purported to be a duplicate of the lease upon which judgment was entered, across the face of which is written these words: "Canceled June 14, 1913, J. M. McDonald, Agent." It was admitted that McDonald wrote this. Defendant also produced a memorandum which he himself had written, which is to the effect that the apartment had been leased to the defendant from July 1 to September 30, 1913, and upon this memorandum McDonald wrote his name. Plaintiff testified that he could read and write and that he never authorized McDonald or anybody else to make the notation of cancellation across the lease, that he did not see the paper prepared by defendant, nor McDonald write his name thereon, and that he never directed him to sign it. McDonald's authority to act in the matter was denied by plaintiff.

M. M. HART and H. J. ROSENBERG, for plaintiff in error.

FRANK P. MCGINN, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Paisley et al. v. Michels, 198 Ill. App. 354.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to sustain finding that agent had no authority to cancel lease. In an action for rent, evidence held sufficient to sustain a finding that plaintiff's agent had no authority to cancel lease of premises in question.*

William W. Paisley and Charles H. Walker, trading as Paisley & Walker, Defendants in Error, v. C. N. Michels, Plaintiff in Error.

Gen. No. 21,687. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916. Rehearing denied April 10, 1916.

Statement of the Case.

Action by William W. Paisley and Charles H. Walker, trading as Paisley & Walker, plaintiffs, against C. N. Michels, defendant, on a judgment note. From a judgment by confession in favor of plaintiffs for \$425, defendant brings error.

Defendant entered his motion to stay execution and permit him to plead and defend. This motion was supported by affidavit. After hearing the motion the court denied it. Defendant contended that his motion should have been allowed because the affidavit showed a good and meritorious defense to the action on the note.

The matter set up as a defense was that plaintiffs, while acting as agents of defendant, falsely and fraudulently made certain representations, and that defendant, being in ignorance of the facts and relying upon

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the statements of the plaintiffs, was thereby induced to trade a piece of real estate for a note secured by trust deed upon other real estate, and some stock in a store. It was said, first, that it was misrepresented that \$2,000 had been paid upon a \$12,000 incumbrance, which was a prior lien upon the real estate covered by the trust deed securing a \$6,000 note which defendant alleged he was induced to accept, and that certain interest instalments had been paid upon this prior incumbrance. Another representation said to be fraudulent was that the stock in the store had a market value in excess of \$125 per share, "whereas in truth and in fact * * * said shares of stock had no market value, but their value, if any, was entirely speculative and uncertain." Defendant did not allege that the stock was not worth \$125 per share, nor that it could not be sold for that amount. It was also alleged that there was a false representation that the \$6,000 note and the trust deed securing it were "in legal form," whereas the note was not correctly described in the trust deed in that the note was made payable "November 1st after date," and the trust deed recited that it was "payable November 1, 1918, after date."

F. C. ELLIS and JESSE WILCOX, for plaintiff in error.

P. H. BISHOP, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 82*—*when affidavit supporting motion to open judgment by confession insufficient.* A motion to open a judgment entered by confession and to permit the defendant to plead should not be granted unless it satisfactorily appears to the court by affidavit that defendant has a good defense upon the merits, such

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Paisley et al. v. Michels, 198 Ill. App. 354.

affidavit to be construed most strongly against such defendant, and it is not sufficient to state facts from which, if proved on a trial, a defense might be inferred.

2. JUDGMENT, § 82*—*when allegation in affidavit supporting motion to open judgment by confession on note insufficient.* Where in an affidavit supporting a motion to open judgment by confession on a note, to stay execution and permit defendant to plead, defendant sets up that plaintiffs while acting as his agents falsely and fraudulently represented that \$2,000 had been paid on a prior lien of \$12,000 on real estate whereby he was induced to trade real estate belonging to him for a note secured by such other real estate, *held* that the value of the real estate not appearing, it made no difference with regard to the value of the note received by plaintiffs as to whether the first incumbrance was \$10,000 or \$12,000, or as to the amount of interest unpaid, and the affidavit was consequently insufficient.

3. JUDGMENT, § 82*—*when allegation in affidavit supporting motion to open up judgment by confession on note insufficient as statement of defense.* Where it was alleged, in an affidavit filed in support of defendant's motion to open up a judgment on a note by confession, that stock traded to defendant by plaintiffs was fraudulently represented as having a market value in excess of \$125, whereas, it had no market value, but its value, if it had any, was speculative and uncertain, it not being alleged that it was worth less than \$125, *held* such allegation was insufficient as a statement of defense.

4. JUDGMENT, § 82*—*when allegations in affidavit supporting motion to open up judgment by confession on note insufficient.* Where a note is made payable "November 1st after date" and the trust deed securing its payment recites that it is "payable November 1, 1918, after date," such discrepancy is at most a clerical error and does not impair the value of the note, and allegations that it was fraudulently represented that the note and trust deed were in due form and that defendant is informed and believes that the note and trust deed might not be acceptable as security or collateral, are unavailing in an affidavit supporting a motion to open up a judgment against defendant by confession on such note.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Charles Brachas, Defendant in Error, v. Sabath & Weisskopf Company, Plaintiff in Error.

Gen. No. 21,723. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Action by Charles Brachas, plaintiff, against Sabath & Weisskopf Company, defendant, for \$529. From a judgment in favor of plaintiff, defendant brings error.

Plaintiff alleged that he had deposited \$500 with defendant as security that Anton Lechowicz would turn over to defendant all collections made by him while employed by defendant; that when it was done, the deposit was to be returned to plaintiff with five per cent. interest; that subsequently Lechowicz left the employ of defendant, having turned over to it all moneys collected by him.

Defendant in its affidavit of defense said that Lechowicz, employed as salesman and collector, made collections aggregating \$190.75 which he failed to turn over to defendant, also that he was indebted to defendant for a balance on his merchandise and cash account, also for an item of expense incurred by defendant in verifying accounts among the trade, also for commissions advanced on sales where the accounts were not collected. The trial court struck from defendant's affidavit the last three items just described and entered judgment against defendant for the difference between the amount of plaintiff's claim, \$529, and \$190.75, the collections said not to have been turned in, which is \$338.25. The court reserved jurisdiction of the balance of plaintiff's claim for future determination. The condition of the deposit of the \$500 was

Brachas v. Sabath & Weisskopf Co., 198 Ill. App. 357.

stated in the written agreement of the parties to be to secure defendant "against any loss from dishonesty, misconduct or neglect of business" of Lechowicz.

SABATH, STAFFORD & SABATH, for plaintiff in error.

BENJAMIN B. MORRIS, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INDEMNITY, § 11*—*what is extent of liability on contract indemnifying against loss from dishonesty, misconduct or neglect of business by salesman.* The condition of a deposit of a specified sum, stated to be the securing of defendant "against any loss from dishonesty, misconduct or neglect of business" of defendant's salesman has reference to any indebtedness due defendant or loss sustained through dishonesty, neglect or misconduct of such salesman including loss due to failure to turn over collections, and does not include balance against such salesman on his merchandise and cash account, an item of expense incurred by defendant in verifying accounts among the trade or commissions on sales where accounts were not collected.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of merits sufficient.* In an action in the Municipal Court of Chicago to recover a deposit stated to be for the security of "defendant against any loss from dishonesty, misconduct or neglect of business" of defendant's salesman, an allegation in defendant's affidavit of merits of such salesman's failure to turn over collections, *held* sufficient as it placed in issue the allegation of plaintiff's statement of claim that such salesman, when he left defendant's employ, had turned over all moneys collected by him.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Carrie O. Meacham et al., Trustees, Defendants in Error, v. Harry H. Lobdell, Trustee, Plaintiff in Error.

Gen. No. 21,811. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARNOLD HEAP, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Action by Carrie O. Meacham, Philo A. Otis and Seymour Morris as trustees, plaintiffs, against Harry H. Lobdell, trustee for Samuel Pitluk and Leo J. Lieberman, copartners, trading as La Salle Street Shoe Store, for pro rata share, by reason of a lease, in moneys recovered by defendant from the sale of assets of such copartners. From a judgment for plaintiffs for \$1,754.22, defendant brings error.

Pitluk and Lieberman were lessees of a store under a written lease from plaintiffs for a term beginning May 1, 1912, and ending April 30, 1917, at a monthly rental of \$500 payable on the first day of each month during the term. The lessees also agreed to pay lessors for electric light used. In April, 1913, the lessees made an assignment of their property to Lobdell, as trustee, to be converted into money to be used in paying their creditors. The rent of the store due April 1, 1913, was not paid. On April 10th the trustee took possession of the premises and occupied them until April 18th. Plaintiffs claimed that under the terms of the lease, the lessees being in default not only as to rent but on other covenants, the entire rental for the balance of the leased term became due and that plaintiffs were creditors of Pitluk and Lieberman to that amount, that is, from April 1, 1913, to April 30, 1917, at \$500 a month, which is \$24,500, and to this should be added

Meacham v. Lobdell, 198 Ill. App. 359.

a bill of \$332.10 for electric light, making a total of \$24,832.10; and from this should be deducted the amount paid by the trustee while he was in possession, namely, \$124.51, leaving a balance due plaintiffs of \$24,707.59. Based upon the allowance of plaintiffs' claim for this amount, judgment was entered for their pro rata share of the moneys in the hands of the trustee.

JOHN C. FARWELL, for plaintiff in error.

EDWARD A. DICKER and ARTHUR A. BASSE, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 24*—*when matters which should have been set up in affidavit of merits not reviewed.* Under the rules of the Chicago Municipal Court, defendant, who was trustee in an assignment for the benefit of the creditors of a copartnership, should have set up the defense that plaintiffs were not parties or beneficiaries of the assignment in the affidavit of merits filed in such suit, and he will be heard only as to those matters of defense specifically set out in his affidavit.

2. MUNICIPAL COURT OF CHICAGO, § 29*—*when existence of copies of agreement presumed.* Where, in a suit in the Municipal Court of Chicago against the trustee of an assignment for the benefit of a copartnership's creditors, it was contended by defendant that plaintiffs did not sign the agreement of assignment, and it appeared that the document in evidence was signed by only one creditor but that eight other creditors shared in the disposition of the proceeds of the money in the hands of the trustee, and there was no evidence that the copy of the agreement in the record was the only copy or that plaintiffs had not signed another copy, *held* a presumption was raised that there must have been another or other copies of the agreement, one of which may have been signed by plaintiffs.

3. MUNICIPAL COURT OF CHICAGO, § 18a*—*when verdict correct in form.* Form of verdict in the files *held* correct, even though it may

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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have been informal, in view of sufficiency of recital in the record as to the verdict returned.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*when motion to amend affidavit of defense properly denied.* Motion of defendant to amend his affidavit of defense was properly denied when made several weeks after the conclusion of the trial and when no amendment was presented to the court at the time the motion was made.

5. LANDLORD AND TENANT, § 75*—*when provision of lease for payment of entire amount of rental as liquidated damages upon assignment for benefit of creditors valid.* Where under provisions of a lease it was provided that if lessees should make assignment for benefit of creditors, the lessees should at once pay to the lessors "a sum of money equal to the entire amount of rent by this lease provided to be paid * * * as the liquidated damages of the lessors," *held* that the claim of lessors for such entire amount of rental as liquidated damages was justified under the terms of the lease as against a trustee of the lessees for the benefit of their creditors.

The People of the State of Illinois, Defendant in Error, v. William De Joy, Plaintiff in Error.

Gen. No. 21,814. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against William De Joy, defendant, for pandering. From a judgment of guilty, defendant brings error.

REYNOLDS, MACY & CLARKE, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. De Joy, 198 Ill. App. 361.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CRIMINAL LAW, § 409*—*when question of sufficiency of information may not be raised on appeal.* Where defendant's attorney goes to trial without objection to the information and it is suggested that the information is insufficient in that it charges several offenses in the alternative and does not describe the place of the offense, and such defects do not go to the question of guilt or innocence, it is too late to object to them in the Appellate Court.

2. PROSTITUTION, § 3a*—*when information for pandering charges only one offense.* The words "inducing" and "persuading" in an information for pandering are practically synonymous and charge only one offense.

3. PROSTITUTION, § 3a*—*what is sufficient description of place in information for pandering.* A charge that the offense of pandering happened in the City of Chicago, at 671 Milwaukee avenue, is sufficient description of the place of the offense.

4. CRIMINAL LAW, § 497*—*when execution of written jury waiver presumed on appeal.* Where the record in a criminal case recites the execution of a jury waiver in writing it imports verity in that regard, and a waiver in the record is not impaired as to its integrity because defendant signed by making his mark.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Joseph Frankel et al., Appellees, v. Sol C. Salzenstein,
Appellant.**

Gen. No. 21,946. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916. Rehearing denied April 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Joseph Frankel and others, plaintiffs, against Sol C. Salzenstein, defendant for excess of advances, over amount due defendant for commissions which he was alleged to be obligated to repay under the contract of employment. From a judgment in favor of plaintiffs, defendant appeals.

The contract commenced to run March 9, 1909, and ended February 28, 1910. It was claimed on behalf of defendant that plaintiffs wrongfully discharged him before the end of the contract, but there was evidence to the effect that at a meeting between defendant and plaintiffs in December, 1909, or possibly January, 1910, defendant proposed "to quit," to which plaintiffs agreed.

DAVID R. LEVY and DOUGLAS C. GREGG, for appellant.

SILVER, ISAACS, SILVER & WOLEY, for appellees; MARTIN J. ISAACS and JAMES D. WOLEY, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Conlon v. Gindele et al., 198 Ill. App. 364.

Abstract of the Decision.

1. MASTER AND SERVANT, § 50*—*when evidence sufficient to sustain finding that servant not wrongfully discharged.* In an action against a traveling salesman for the excess of advances over commissions earned, evidence *held* sufficient to establish that defendant was not wrongfully discharged, and that he quit under an agreement.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*when sufficiency of statement of claim admitted.* Upon the question of competency of evidence to support the judgment in an action for the repayment of the excess of plaintiffs' advances over commissions due defendant as a salesman, where plaintiffs' statement of claim alleges advances to defendant which defendant's affidavit of merits admit, and further states the amount of orders upon which defendant is entitled to commissions, and where defendant did not avail himself of the provisions of rules of the Chicago Municipal Court whereby he could have questioned the correctness of such statement or be excused for cause from a specific answer, *held* that the correctness of plaintiffs' statement of the account was admitted and it was unnecessary to make detailed proof thereof.

Charles M. Conlon, Defendant in Error, v. Geo. W. Gindele, Executor of the Estate of Emma Gindele, deceased, and Frank C. Conover, Plaintiffs in Error.

Gen. No. 21,641.

1. INJUNCTION, § 355*—*what constitutes prima facie case in action on bond.* An injunction bond and the decree of the court in the suit in which the injunction bond was given are sufficient to establish primarily plaintiff's right to recover the penalty of such bond and to support a judgment therefor, notwithstanding that a writ of error has been sued out to reverse such decree.

2. JUDGMENT, § 401*—*when decree res adjudicata.* A decree is *res adjudicata* and binds the parties until it is reversed or modified and cannot be collaterally attacked notwithstanding a writ of error may have been sued out.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conlon v. Gindele et al., 198 Ill. App. 364.

3. APPEAL AND ERROR, § 7*—*when writ of error a new suit.* The suing out of a writ of error is a new suit and in no way affects the verities of the decree in that suit.

4. INJUNCTION, § 234*—*who bound by decree in suit in which bond given.* Defendant in a suit on an injunction bond is as much bound by the decree in the suit in which the bond is given as are the parties to that suit.

5. INJUNCTION, § 234*—*when evidence to collaterally attack decree inadmissible.* The exclusion of evidence proffered for the purpose of collaterally attacking a decree of the Circuit Court, held without error in an action on an injunction bond given in the suit in which such decree was rendered.

6. INJUNCTION, § 234*—*when assessment of damages upon dissolution of injunction res judicata in action on bond.* Where the judgment in an action on an injunction bond conforms to the amount of damages assessed by the court of chancery on the dissolution of the injunction, such assessment is not reviewable by the trial court.

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed March 27, 1916. Rehearing denied April 10, 1916.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for plaintiff in error.

HARRY A. BLOSSOT, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The writ of error in this case brings before us for review a judgment of the Municipal Court for \$613.27. The trial was by the court without a jury.

The action is grounded on an injunction bond. The bond was conditioned to pay all costs and damages that shall be awarded against the complainant in suit B-4519, Circuit Court, in case said injunction was dissolved. Plaintiff offered in evidence the injunction bond, which was received without objection. Against the objection of defendant a copy of the decree of the Circuit Court entered in the suit in which the injunc-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conlon v. Gindele et al., 198 Ill. App. 364.

tion bond was given was received in evidence. The objection urged why the decree should not be received in evidence was because it failed to show the evidence upon which the decree was based, and that if the evidence were examined it would be manifest that the decree was erroneous. The decree found that the injunction in which the bond was given was dissolved February 9, 1915, and that the injunction was improvidently granted.

Defendant contended that plaintiff was not entitled to recover any damages in this suit, and in the trial court offered as a defense all the pleadings and the certificate of evidence in the suit in which the injunction bond was given. Upon the objection of plaintiff, defendant's proffered evidence was excluded.

The evidence in the record is sufficient to support the judgment. The injunction bond and the decree of the court in the suit in which the injunction bond was given were all that was necessary to establish primarily plaintiff's right to recover. Notwithstanding it may be the fact that a writ of error had been sued out in an attempt to reverse the decree in evidence, yet that decree could not be collaterally attacked, and until reversed or modified the decree is *res adjudicata* and binds the parties. *Brown v. Schintz*, 203 Ill. 136, and cases there cited.

The suing out of a writ of error is a new suit, and in no way affects the verities of the decree attacked in that suit. Defendant is as much bound by the decree in the suit in which the bond was given as are the parties to that suit, for, as said in *McAllister v. Clark*, 86 Ill. 236: "The misfortune to him is, his contract binds him to abide that decree without being a party to it. His undertaking is that he 'will pay all such costs and damages as shall be awarded against the complainant in case the injunction shall be dissolved.'"

Defendant could not attack collaterally the decree

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of the Circuit Court; therefore the exclusion of the evidence proffered for that purpose was without error. *Maloney v. Dewey*, 127 Ill. 395. The judgment conforms to the amount of the damages assessed by the court on the dissolution of the injunction. This assessment of damages was not reviewable by the trial court.

The judgment of the Municipal Court being without error is affirmed.

Affirmed.

**P. A. Johnson, Plaintiff in Error, v. Paul Feyrirsen,
Defendant in Error.**

Gen. No. 21,684. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here for \$717.58 for plaintiff. Opinion filed March 27, 1916.

Statement of the Case.

Action by P. A. Johnson, plaintiff, against Paul Feyrirsen, defendant, for balance of contract price due under terms of contract to erect building. From a judgment allowing him \$404.90, after the deduction of damages for defendant's recoupment, plaintiff brings error.

Plaintiff had a contract to do certain work in the erection of a building for defendant and after all the work had been done received an architect's certificate for \$671, the balance of the contract price. By the terms of the contract plaintiff agreed to complete all the work he had undertaken to do on or prior to August 25, 1914. As a matter of fact this he failed as to one store to do. The work of plaintiff on this store was completed on September 15, 1914, a delay

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of twenty-one days. Defendant claimed that he had rented this store to a tenant who had paid \$5 on account to bind the bargain, at a rental of \$35 a month, which was the reasonable rental value of the store.

Defendant testified that he never saw this prospective tenant again and was unable to find him. The store remained unrented until May 15, 1915, and defendant claimed that the loss of the prospective tenant was due to the store not being ready for occupancy by such tenant at the time plaintiff had contracted to complete his work. Defendant claimed that the measure of his damages was the rental value of the store during the time it remained unrented, and the trial judge, heeding defendant's contention, gave judgment for \$404.90, the amount of the architect's certificate, less the rental value of the store at the rate of \$35 a month from August 25, 1914, when plaintiff's work should have been completed, to May 15, 1915, when defendant succeeded in securing a tenant. Plaintiff asked for a reversal and a judgment in his favor for the amount of the architect's certificate with interest, less the rental value of the store for twenty-one days, defendant's damages assessable for noncompletion within the contract time.

KREMER & GREENFIELD, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. SET-OFF AND RECOUPMENT, § 18*—*when owner of building may recoup damages for delay in action by contractor.* Where a defendant claims damages by reason of delay in the performance of a building contract, whereby such defendant has been deprived of the use of the building, he may recoup the same in a suit against him by the contractor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McKenna v. South Park Commissioners, 198 Ill. App. 369.

2. DAMAGES, § 66*—*what is measure of for delay in performance of building contract.* The measure of damages for delay in performance of a building contract which the owner may recoup in a suit against him by the contractor is the fair rental value from the time when the premises should have been completed under the terms of the contract until the time of completion.

Walter E. McKenna, Plaintiff in Error, v. South Park Commissioners, Defendant in Error.

Gen. No. 21,692. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Mandamus by Walter E. McKenna, relator, against South Park Commissioners, respondents, to have respondents ordered to forthwith place his name upon the roster of patrolmen so that he might perform the duties of and keep that office. From a judgment dismissing his petition, relator brings writ of error.

Walter E. McKenna was a patrolman in the employ of the Board of South Park Commissioners. McKenna was what is known as a "Civil Service Employee." He received his appointment May 17, 1911. On August 17, 1914, the Civil Service Board of the South Park Commissioners preferred charges against McKenna and appointed H. C. Carbaugh and H. J. Furber, Jr., as a trial board to try McKenna. McKenna was charged with conspiring with officer Sullivan on August 8, 1914, to demand from Walter H. Wulser, who had been arrested, \$30. Wulser paid that sum, and McKenna released him. On this charge McKenna was tried, found guilty and discharged from his office.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McKenna v. South Park Commissioners, 198 Ill. App. 369.

It appeared from McKenna's petition that a partial hearing of his case was had in September, 1914, before Carbaugh and Furber, the trial board, and that owing to the sickness of McKenna the further hearing was postponed until February 15, 1915, at which time McKenna personally appeared and was heard in his own defense. Furber did not sit upon the trial board, and the hearing of McKenna in his own defense was had before Carbaugh, who alone sat as the trial board. The right to mandamus was predicated upon the contention that Furber was absent at the hearing on February 15, 1915, and that the report on McKenna's case, which was adopted by the civil service board, was made by Carbaugh only, and it was contended that Carbaugh had no jurisdiction to hear alone the charges and report his findings thereon. To McKenna's petition a general demurrer was interposed and sustained and the petition dismissed, and McKenna prosecutes this writ of error, seeking a reversal.

A. D. GASH, for plaintiff in error.

ROBERT REDFIELD, for defendant in error; TOLMAN, REDFIELD & SEXTON and HENRY P. CHANDLER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CIVIL SERVICE, § 25*—*when presumed that single member of park civil service board authorized to act as trial board.* In mandamus proceedings by a patrolman to secure reinstatement on the roster of patrolmen of a board of park commissioners where the Park Civil Service Act, (Hurd's Rev. St., ch. 24a, sec. 12, J. & A. ¶ 8260), provides that "charges shall be investigated by * * * the civil service board or by * * * some officer or officers ap-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McKenna v. South Park Commissioners, 198 Ill. App. 369.

pointed by the board," and where the trial board which heard relator's case consisted of two men, only one of whom held the hearing and reported findings thereon, and it is not denied that the proceedings were otherwise regular, and where the park civil service board approved of such single member as its trial board and not only approved his report but acted upon its recommendation, it will be assumed that such single member was authorized to act as the trial board under authority of the park civil service board, there being no averment that he was not so acting or authorized to act.

2. CIVIL SERVICE, § 25*—*when presumed that park civil service board authorized one of its members to act as trial board.* Where a park civil service board had the power to change the personnel of its trial board at any time, in the absence of any averment to the contrary, in mandamus by a discharged park patrolman for reinstatement, it will be assumed that it authorized a single member of such trial board to proceed as sole trial officer.

3. CIVIL SERVICE—*when any illegality in appointment of persons on trial board corrected by action of board.* If there is room for any doubt as to the legality of the appointment of the persons constituting a park trial board, the ratification of the action of the board by the park civil service commission in approving and adopting its report and findings is a sufficient corrective.

4. CIVIL SERVICE, § 25*—*when patrolman petitioning for reinstatement may not raise jurisdictional question of trial board on appeal.* A discharged park patrolman, petitioning for mandamus to reinstate himself as such patrolman, who appeared at the trial before a trial board in person and was heard in his own defense, and made no protest or objection to the jurisdiction of the trial board either before that board or to the park civil service commission, cannot raise the jurisdictional question for the first time on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hartman v. City of Chicago et al., 198 Ill. App. 372.

A. B. Hartman, Defendant in Error, v. City of Chicago and Charles Bostrom, Commissioner, Plaintiffs in Error.

Gen. No. 21,720. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 27, 1916.

Statement of the Case.

Mandamus by A. B. Hartman, relator, against the City of Chicago and Charles Bostrom, commissioner of buildings of the City of Chicago, respondents, to compel respondents to approve plans for a certain building and to issue a permit authorizing its erection. From a judgment in favor of relator, respondents bring error.

According to these plans, metal covering was to be used for the walls and ceilings of the building, without any plaster on the inner side between such metal and the wall or ceiling, which was violative of the provisions of section 605 of the 1911 Chicago Code. The respondents interposed to this petition a general demurrer, which was not disposed of. The finding part of the final order and judgment was as follows:

“This cause coming on to be heard upon the demurrer, of respondents to the petition of petitioner and after arguments of counsel and being fully advised in the premises, the court doth find that section 605 of the building ordinances of the City of Chicago as amended and passed and in force on and after March 9, 1914, is unreasonable and void as to each and all of the provisions thereof requiring lathing and plaster above and behind metal covered ceilings and walls in buildings erected in said city.”

The order continued by awarding a mandamus

Hartman v. City of Chicago et al., 198 Ill. App. 372.

against the City of Chicago and its building commissioner, as prayed in Hartman's petition.

SAMUEL A. ETTIELSON and RICHARD S. FOLSOM, for plaintiffs in error; LEON HORNSTEIN, of counsel.

A. G. DICUS, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MANDAMUS, § 172*—*when final order awarding writ may not be entered.* In proceedings for mandamus, a final order awarding the writ cannot be entered by the court until a general demurrer to the petition has been disposed of.

2. MANDAMUS, § 150*—*when respondent may elect to abide by demurrer or answer petition.* After the disposition of a general demurrer to petition for writ of mandamus to compel a city and its building commissioner to issue a building permit to relator, respondents may elect to abide by their demurrer or answer the petition.

3. MANDAMUS, § 162*—*when reasonableness of building ordinance question of fact in action to compel issuance of building permit.* Where, after the disposition of a general demurrer to a petition for writ of mandamus to compel a city and its building commissioner to issue a building permit, respondent elects to abide by his demurrer, the question of the reasonableness of an ordinance requiring lathing and plaster above and behind metal covered ceilings and walls in such city may become a question of fact.

4. MANDAMUS, § 169*—*when validity of building ordinance presumed.* In proceedings for mandamus to compel a city and its building commissioner to issue a building permit, a building ordinance requiring lathing and plaster above and behind metal covered ceilings and walls in buildings erected in such city will be presumed to have been passed in the exercise of the police power, and it will be assumed, until the contrary appears, that it is reasonable and the determination of the city council on that subject *held* to be conclusive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

I. Lurya Lumber Co. v. Goldberg, 198 Ill. App. 374.

**I. Lurya Lumber Company, Defendant in Error, v.
Philip Goldberg, Plaintiff in Error.**

Gen. No. 21,726. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1915. Reversed. Opinion filed March 27, 1916.

Statement of the Case.

Action for mechanic's lien by I. Lurya Lumber Company, plaintiff, against Philip Goldberg, defendant. From a judgment for plaintiff, defendant brings error.

The claim for a mechanic's lien was not passed upon. Defendant had a contract with L. Harris, a general contractor, for the erection of a building, in which contract all liens and claims or right of lien under the Mechanic's Lien Act for labor or materials furnished, etc., were waived. One Lazar had a contract with Harris for carpenter work to the amount of \$2,100. Plaintiff furnished lumber to Lazar, which was used in defendant's building under the Harris contract. The Heitman Bond and Mortgage Company made a building loan on Goldberg's property and plaintiff executed and delivered a waiver and release of any and all liens and claims or right to a lien on Goldberg's premises on account of any material it had furnished to Lazar, which waiver and release it delivered to the mortgage company. The court awarded the judgment on the theory that Goldberg had testified in a prior suit that he had reserved out of the money to become due to Lazar, \$200, which he was holding for the plaintiff. This claim was refuted by the testimony of defendant, Harris, the general contractor, and Frank Heitman, who represented the mortgage company.

BENJAMIN E. COHEN, for plaintiff in error.

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No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **MECHANICS' LIENS, § 136***—*when subcontractor bound by waiver of right to lien in contract between owner and contractor.* A contract with a general contractor to build defendant's house having waived the right to mechanics' liens for labor or materials under Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*), such waiver was binding upon all persons furnishing labor or materials under any subcontract with such general contractor, and no claim for a lien can be maintained on account of lumber furnished to a subcontractor of such general contractor.

2. **MECHANICS' LIENS, § 161***—*when subcontractor may not obtain money judgment against owner.* Plaintiff, having no lien under Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*) for lumber furnished a subcontractor on account of a waiver of all such liens by the principal contractor, cannot obtain a money judgment against defendant, for whom the building was erected, in an action for mechanic's lien.

3. **MECHANICS' LIENS, § 196***—*when evidence insufficient to establish holding out of part of contract price to pay subcontractor.* In an action by a subcontractor for a mechanic's lien, evidence held insufficient to establish that defendant held out a certain sum from the contract price which was to be applied on plaintiff's claim.

4. **MECHANICS' LIENS, § 212***—*when case not remanded.* Plaintiff in action for mechanic's lien, having no lien under the Mechanics' Liens Act (J. & A. ¶ 7139 *et seq.*) for lumber furnished a subcontractor because of a waiver of all such liens by the principal contractor, has no cause of action against defendant, for whom the building was erected, enforceable in a court of law and the Appellate Court will not remand the cause.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Leoni, 198 Ill. App. 376.

The People of the State of Illinois, Defendant in Error, v. Edward Leoni, Plaintiff in Error.

Gen. No. 21,743. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS F. ROBINSON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois against Edward Leoni. From a judgment convicting him of being an inmate of a house of prostitution, defendant brings error.

The prosecution was brought under section 57 a—1, ch. 38, Rev. St. 1915 [Cal. Ill. St. Supp. 1916, ¶ 3591 (1)].

A jury being waived, the trial judge after hearing the evidence found defendant guilty of the criminal offense of being an inmate of a house of ill fame kept for the purpose of fornication and fixed his punishment at thirty days' imprisonment in the House of Correction, the payment of a fine of \$100 and costs of the prosecution, taxed at \$6.50, in default of payment of which defendant was to be detained in the House of Correction until the fine and costs were worked out at the rate of \$1.50 per day, or until discharged by due process of law as by statute provided.

Only the statutory record was brought before the Appellate Court. The errors complained of were said to be encompassed within this record. The prosecution was by information. The statute which defendant was charged with offending went into force July 1, 1915. Defendant contended that the information stated no offense where it charged that defendant "on the 7th day of August, A. D. 1915, at the City of Chicago aforesaid, at, to-wit: 1259 W. Madison street,

was then and there an inmate of a house of ill fame or assignation or prostitution or lewdness, contrary to the statute.” The contention was that the charges being in the disjunctive are insufficient to charge any offense of which defendant can be convicted, and that the venue in the caption of the information is no part of the information. Defendant voluntarily went to trial upon the information without objecting to its sufficiency or moving to quash.

BENJAMIN E. COHEN, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CRIMINAL LAW, § 506*—*when presumed that evidence sufficient to sustain conviction and judgment.* Where only the statutory record in a criminal prosecution is brought before the Appellate Court and all the errors complained of are said to be encompassed within such record, it will be assumed that the evidence was sufficient to sustain the conviction and judgment if the information warrants the conviction and the judgment is a lawful one.

2. PROSTITUTION, § 4c*—*when question of insufficiency of information may not be raised on appeal.* The objections made for the first time on review that charges in the information charging a person with being an inmate of a house of ill fame, on which he is prosecuted, are in the disjunctive and that the venue in caption of such information is no part of the information, held without force, where defendant did not challenge its sufficiency in any way before the trial court or call for the ruling of the court thereon.

3. PROSTITUTION, § 3a*—*when information charging occupancy of house of ill fame sufficient.* An information charging that defendant was “an inmate of a house of ill fame or assignation or prostitution or lewdness,” even though in the disjunctive, charges but one offense in legal effect and intentment.

4. INDICTMENT AND INFORMATION, § 13*—*venue as part of informa-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tion. The venue is a part of the information, and the charge that the offense was committed at the "City of Chicago aforesaid," by construction refers to the venue as laid in the caption of the information.

5. PROSTITUTION, § 3a*—*when information charging defendant with being an inmate of house of ill fame sufficient.* On the contention that an information charging defendant with being an inmate of a house of ill fame does not charge that such act is unlawful, held it is sufficient if the charge is in the language of the statute and the statute made the act charged unlawful.

6. PROSTITUTION, § 4*—*when evidence presumed to sustain charge in information.* Where the evidence in a prosecution for being an inmate of a house of ill fame is not in the record before the court of review, all intendments must be indulged necessary to sustain the charge in the information.

7. APPEAL AND ERROR, § 198*—*lack of jurisdiction of Appellate Court in constitutional matters.* The Appellate Court has no jurisdiction to determine constitutional questions.

8. APPEAL AND ERROR, § 1265*—*when Appellate Court will presume statute constitutional.* The Appellate Court will presume that a criminal statute is constitutional, as it has no jurisdiction over constitutional questions.

9. APPEAL AND ERROR, § 1718*—*when constitutional question waived.* Where the constitutionality of a criminal statute is involved, the review should be prosecuted to the Supreme Court, and seeking a review by the Appellate Court waives any constitutional question which might otherwise be raised.

10. COSTS, § 122*—*when culprit may be sent to House of Correction for nonpayment of costs.* Hurd's Rev. St., ch. 38, sec. 452 (J. & A. ¶ 4152), authorizes imprisonment for the nonpayment of fines or costs, and section 448 of such chapter (J. & A. ¶ 4148) provides that where jail sentences may be imposed upon defendants, the court may send the culprit to the House of Correction.

11. CRIMINAL LAW, § 391*—*how statute authorizing working out fine and costs in House of Correction construed.* Hurd's Rev. St., ch. 38, sec. 448, (J. & A. ¶ 4148) providing that the fine and costs imposed on a culprit sentenced to the House of Correction for nonpayment of such fine and costs may be "worked out" at the rate of \$1.50 per day, is in the interest of the convicted person, as it minimizes his term of imprisonment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edwin D. Weary, Defendant in Error, v. Winton Motor Car Company, Plaintiff in Error.

Gen. No. 21,746. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed March 27, 1916.

Statement of the Case.

Action by Edwin D. Weary, plaintiff, against the Winton Motor Car Company, defendant, for damages caused to plaintiff's automobile in a collision with defendant's automobile. From a judgment in favor of plaintiff for \$238.30, defendant brings error.

Plaintiff's contention was that the automobile of defendant struck his automobile while he was turning his car around in the middle of the block. On the question of damages, defendant contended that just prior to the instant collision, plaintiff's car had been in collision with a horse-drawn truck, but the court would not permit defendant's counsel to ask questions on cross-examination concerning such former collision.

JOHN A. BLOOMINGSTON, for plaintiff in error.

A. C. WYLIE and RALPH ROSEN, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 6*—*when cross-examination of plaintiff as to prior collision improperly refused in action for damages for injury to automobile.* Where, on the question of damages in a suit therefor, on account of the collision of defendant's automobile with plaintiff's automobile, defendant sought to elicit by cross-examination of plaintiff that plaintiff, a few minutes before

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the instant accident, had a collision between his machine and a horse-drawn truck which had caused damage to plaintiff's machine, *held* to be error to refuse to permit such cross-examination.

2. AUTOMOBILES AND GARAGES, § 6*—*when refusal of cross-examination of witness on question of damage to automobile erroneous.* Where trial court refused to allow questions to be put to witness of plaintiff testifying as to the amount of damage done his automobile by defendant's automobile in a suit for damages, such questions having reference to the amount of damage caused plaintiff's car in a prior collision with a horse-drawn truck, and where such witness did not see plaintiff's car until after both collisions, and his estimate of damages did not take into consideration the former collision, such refusal *held* to be error.

3. AUTOMOBILES AND GARAGES, § 6*—*when refusal of cross-examination of witness for plaintiff as to prior collision erroneous.* Where plaintiff in an action for damages for injury to his automobile as a result of a collision with another automobile was allowed to prove by a witness that a police officer had stated to him that plaintiff was without fault in the collision on account of which suit is brought, and where the court refused to allow counsel for defendant to ask this officer whether plaintiff had not admitted to him that his car had a few minutes prior to the collision with defendant's car been in collision with a horse-drawn truck, and that as a result of such collision his car had been damaged, *held* that such refusal was error.

4. AUTOMOBILES AND GARAGES, § 6*—*when evidence inadmissible as being hearsay.* Where the son of plaintiff was permitted to testify that a police officer had stated to him that his father was without fault in the collision with defendant's automobile on account of which suit was brought, such testimony was clearly hearsay.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Schwartz v. Brinks Chicago City Express Co., 198 Ill. App. 381.

Jacob Schwartz, Administrator of the Estate of Hascal Schwartz, Deceased, Appellee, v. Brinks Chicago City Express Company, Appellant.

Gen. No. 21,866.

1. APPEAL AND ERROR, § 1143*—*when motion to strike bill of exceptions from files and motion to vacate order denied.* The proper dispatch of business in the Appellate Court will not permit of its waiting the convenience of counsel in returning files, and where appellee moves to strike bill of exceptions from the files and to affirm the judgment, and where the record, an examination of which is indispensable to decide the motion, is not in the files but in the possession of appellee, the motion is denied and a subsequent motion to vacate that order is also denied.

2. APPEAL AND ERROR, § 1143*—*when Appellate Court on its own motion will vacate order.* Having previously denied a motion to strike the bill of exceptions from the record, as well as a motion to vacate the order thereon and to entertain the prior motion, the Appellate Court on its own motion will vacate its order on the latter motion and allow the former where it is imperative on it to strike such bill of exceptions from the files.

3. APPEAL AND ERROR, § 784*—*when bill of exceptions signed by other than trial judge stricken from record.* Where by the terms of orders allowing ninety days for the filing of a bill of exceptions and extending such time twenty days, the time for filing thereof expired on September 15, 1915, and on August 25, 1915, such bill of exceptions was presented to and signed by a judge other than the trial judge, and on September 21, 1915, it was signed and approved by the trial judge who ordered it filed *nunc pro tunc* as of August 25, 1915, and it was actually filed on September 21, 1915, and no statutory or other reason is shown by the record why the same was not signed and approved by the trial judge within the time allowed by the court, nor as to his disability by reason of death, sickness, etc., as required by Hurd's Rev. St., ch. 110, sec. 81 (J. & A. ¶ 8618), and the record is silent as to whether or not the judge by whom the record was signed on August 25, 1915, was presiding in the trial court at the time and that due diligence had been shown to present it to the trial judge before presenting it to such other judge, and there is no recitation by the trial judge why the bill of exceptions was not presented to him within the proper time, the bill of exceptions will be stricken from the record.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. APPEAL AND ERROR, § 843*—*when other than trial judge may sign bill of exceptions.* Under Hurd's Rev. St., ch. 110, sec. 81 (J. & A. ¶ 8618), it is necessary to show inability of the trial judge to sign a bill of exceptions by reason of death, sickness or other disability, in order to authorize a judge other than the trial judge to sign such bill of exceptions.

5. APPEAL AND ERROR, § 843*—*when trial judge may not sign bill of exceptions presented to other judge and order it filed nunc pro tunc.* The presentation of a bill of exceptions, within the allowed time to a judge who did not preside at the trial and his marking it as presented does not authorize the trial judge to sign the same and order it filed *nunc pro tunc* as of the time when presented to such other judge, it not appearing that such other judge, at the time, was presiding in the same court where the action was tried, or that due diligence had been shown by defendant in seeking to present the bill to the trial judge before presenting it to such other judge, and there is no recitation by the trial judge why the record was not presented within the proper time.

6. APPEAL AND ERROR, § 784*—*when bill of exceptions defective.* A bill of exceptions not having been presented to the trial judge within the proper time, a recitation by the trial judge as to the reason therefor is essential.

7. APPEAL AND ERROR, § 1751*—*when judgment affirmed for lack of proper bill of exceptions.* Where the bill of exceptions is stricken from the files and there is no error apparent in the remaining common-law record, the judgment will be affirmed.

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

R. P. GARRETT, for appellant; ZIMMERMAN & GARRETT, of counsel.

ADLER & LEDERER, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal by defendant from a judgment against it for \$2,500 rendered upon the verdict of a jury in an action for negligently causing the death of plaintiff's intestate, a little boy of the age of four years.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellee moved the court, on January 17, 1916, to strike the bill of exceptions from the files and to affirm the judgment, which motion the court took for deliberation in conference. When the motion was reached in conference the record, which it was indispensable for the court to examine in order to decide the motion, was not in the files, but was in the possession of counsel for appellee. For this reason the motion was denied. A motion subsequently made to vacate that order and to entertain the prior motion was made and denied.

The proper dispatch of the business of this court will not permit of its waiting the convenience of counsel in returning files retained in their offices and without which the motion made by such counsel cannot be decided. We would not now recede from our former action were it not imperative on us to do so in order that our decision may rest upon the law as announced in the cases hereinafter cited.

Counsel for appellee in their brief renewed their motion to strike the bill of exceptions and to affirm the judgment, and the court in conference, on examination of the record then before it, on its own motion vacated the order entered on the motion of January 31, 1916, leaving the motion to strike and affirm for consideration and disposition at this time. That motion must be allowed.

The chronological order of events is as follows:

The judgment appealed from was entered May 29, 1915. Defendant was by order duly entered given ninety days from that date in which to file its bill of exceptions. On August 21, 1915, the time for filing the bill of exceptions was extended twenty days from August 26, 1915. By the last order the time for filing bill of exceptions expired on September 15, 1915.

The trial judge was the Honorable Richard S. Tutthill. On August 25, 1915, Victor P. Arnold, who we will assume was likewise a judge of the Circuit Court

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notwithstanding there is nothing in the record to so indicate, marked upon the bill of exceptions that it was presented to him on that date. On the 21st day of September, 1915, Judge Tuthill, the trial judge, signed and approved the bill of exceptions and ordered it filed *nunc pro tunc* as of August 25, 1915, and it was filed September 21, 1915.

No statutory reason is made to appear to account for the presentation of the bill of exceptions to Judge Arnold, nor is any reason shown by the record why the same was not signed and approved by the trial judge within the time allowed by the order of court. This case is not distinguishable from *People v. Rosenwald*, 266 Ill. 548, or *Illinois Improvement & Ballast Co. v. Heinsen*, 271 Ill. 23.

There is nothing in the record showing that the trial judge "by reason of the death, sickness or other disability" was unable to sign the bill of exceptions, or that such judge was at that time suffering from any disability of a physical or mental nature which prevented him from performing his duties or functions. Such disability is required by section 81, ch. 110, Rev. St. (J. & A. ¶ 8618), in order to authorize a judge other than the trial judge to sign the bill of exceptions.

The presentation of the bill of exceptions in the record to Judge Arnold and his so marking it did not authorize the trial judge to sign the same and order it filed *nunc pro tunc* as of the date when the same was presented to Judge Arnold. Judge Arnold's marking the bill as having been presented would have been sufficient to furnish a basis for the *nunc pro tunc* order by the trial judge when he signed the bill of exceptions if there was any recitation in the record that the marking by Judge Arnold of its presentation was so done while he was presiding in the Circuit Court, and that due diligence had been shown by defendant in seeking to present the bill to Judge Tuthill before presenting it to Judge Arnold. The record is absolutely

silent on these matters. Neither is there any recitation of any fact by the trial judge why the bill of exceptions was not presented to him within the proper time. Such a recitation by the trial judge is essential and cannot be dispensed with.

Where, as here, the record shows that the bill of exceptions was not actually signed within the time granted for filing it, it is not properly in the record. Under the cases above cited this bill of exceptions was not filed within the time authorized by law. It therefore must be, and is, stricken from the files. There is nothing now before us but the common-law record, and in it there appears to be no error.

The bill of exceptions is stricken from the files and the judgment of the Circuit Court is affirmed.

Affirmed.

The People of the State of Illinois ex rel. Mary Belasco, Appellee, v. Howard Langford, Appellant.

Gen. No. 21,920. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed March 27, 1916.

Statement of the Case.

Prosecution for bastardy by the People of the State of Illinois *ex rel.* Mary Belasco, plaintiff, against Howard Langford, defendant. From a money judgment against him, defendant appeals.

Defendant waived a trial by jury, and the case was heard by the trial judge, who found the defendant to be the putative father of a bastard child born to the relatrix. The errors assigned and argued were that

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the finding and judgment were contrary to the weight of the evidence, that there was no proof that relatrix was unmarried at the time of conception, and that relatrix and defendant were nonresidents of this State. Relatrix testified that she was an unmarried woman; that defendant was the only man she ever carnally knew, and no attempt was made to prove otherwise. At the final hearing each side produced two additional witnesses. Those for relatrix corroborated her on material matters, and contradicted defendant regarding matters which he by his testimony had denied. Defendant's witnesses testified to negative facts which were without probative force and tended in no degree to establish any material controverted fact.

CAVENDER & KAISER, for appellant.

MACLAY HOYNE, for appellee; EDWARD E. WILSON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. BASTARDS, § 60*—*when insufficiency of evidence as to relatrix being married waived on appeal.* Where relatrix in a bastardy action testified that she was an unmarried woman at the time of conception and no challenge of this or motion for a finding in defendant's favor is made on such grounds, the contention that it is not proved that she was unmarried at such time is unavailing on appeal.

2. BASTARDS, § 22*—*when preponderance of evidence with relatrix.* In a bastardy case the preponderance of evidence held to be with relatrix, it appearing that at the final hearing each side produced two witnesses in addition to relatrix and defendant, that those for relatrix corroborated her on material matters and contradicted defendant on matters which he had denied, and that defendant's witnesses testified to negative facts without probative force.

3. BASTARDS, § 60*—*when objection to jurisdiction of court waived.* Where the parties in a bastardy action are nonresidents of this

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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State but are both within the jurisdiction of the court, as is also the child, who was born in the State, and where defendant was arrested in the State on relatrix's complaint and appeared and pleaded without making any objection to the court's jurisdiction, it is too late for him to object in the court of review that the parties are nonresident.

**Charles E. Doose, Plaintiff in Error, v. Adela E. Doose,
Defendant in Error.**

Gen. No. 21,219.

1. **DIVORCE, § 47***—*when evidence sufficient to show extreme and repeated cruelty towards wife.* On a bill by a wife for divorce, evidence *held* sufficient to sustain a finding that defendant was guilty of extreme and repeated cruelty.

2. **DIVORCE, § 16***—*when condonation of conduct of husband no bar to divorce.* Where it appeared that the wife in a suit for divorce lived with her husband for three weeks after the commission of his last act of physical violence upon her but thereafter went to a hospital and lived continuously separate and apart from him, that two months after she went to the hospital her husband filed the bill for divorce, making charges against her of extreme and repeated cruelty towards him, which, if untrue, probably wounded her greatly, and where it further appeared that on the trial he made no attempt to prove such charges and did not dispute her testimony as to his cruelty; *held* that even though her cohabitation with him during such three weeks amounted to a condonation of his cruelty, his subsequent conduct, after she had gone to the hospital, did not show "good usage and conjugal kindness," and that her condonation, if any there was, did not constitute a bar to her obtaining an absolute divorce.

3. **DIVORCE, § 16***—*what constitutes condonation.* Condonation is forgiveness upon condition that the injury shall not be repeated.

4. **DIVORCE, § 16***—*when condoned offense revived.* Any misconduct, not necessarily of the same character as that condoned, such as accusations against the woman, revive the condoned offense.

5. **DIVORCE, § 16***—*what is effect of condonation by wife.* Con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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donation is not so strict a bar against a wife as against a husband, inasmuch as she may find it difficult to quit the common domicile and often submits through necessity.

6. DIVORCE, § 16*—*what does not constitute condonation.* Forbearance of the wife to abandon her husband and sue does not weaken her title to relief.

7. DIVORCE, § 16*—*when condonation not pleaded as a defense no bar to right of wife to divorce.* Where the husband, who is cross-defendant in a divorce suit, did not plead condonation as a defense and the point was not urged or even mentioned on the hearing, such condonation will not in the exercise of the court's discretion prevent the wife from obtaining a divorce.

8. DIVORCE, § 18*—*what does not constitute collusion to obtain divorce.* Where an arrangement exists between the parties as to a division of the property in the event a decree of divorce should be granted, it cannot be inferred from the fact of the existence of such an arrangement as to *property* that there was collusion to obtain a *divorce*.

Error to the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916.

Statement of the Case.

On January 29, 1914, Charles E. Doose, complainant, filed his bill for divorce in the Superior Court of Cook county against his wife, Adela E. Doose, on the ground of extreme and repeated cruelty. The wife filed an answer in which she denied the charges of cruelty, and alleged that on November 30, 1913, she entered the Evanston Hospital for the purpose of having an operation performed, and that while she was absent from home complainant removed all of the furniture therefrom and rented the house and has ever since refused to live with her or support her. On April 8, 1914, the wife filed a cross-bill for divorce, alleging her marriage to complainant in November, 1894, and her residence in Illinois continuously since that date; that she had lived and cohabited with complainant as his wife "until on or about December 1, 1913"; that he had been guilty of extreme and repeated cruelty towards her; that on one occasion during the month of April, 1912,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

without any provocation, he became enraged and seized her by the throat and choked her, and that about October 29, 1913, he again choked her and otherwise maltreated her, and that on other occasions, while in anger, he had choked, struck and beaten her; that she was now living separate and apart from her husband in rooms which she had rented near their former residence in Wilmette, Illinois; and that there was born of the marriage a son, Carl W. Doose, who was residing with her. On the same day complainant filed an answer to said cross-bill in which he admitted the marriage in November, 1894, cross-complainant's continuous residence in Illinois since that time, and that the parties had lived and cohabited together as husband and wife from that time until on or about December 1, 1913. He denied the charges of cruelty, but admitted that cross-complainant was living separate and apart from him.

On April 10, 1914, the cause came on for hearing in open court before the chancellor. Both parties were represented by counsel. The complainant did not introduce any evidence in support of his bill. In support of the allegations of the cross-bill the cross-complainant and Carl W. Doose testified, but they were not cross-examined. The cross-complainant testified, in substance, that she was married to complainant on November 11, 1894; that she had been a resident of Wilmette, Illinois, for the past eight years; that Carl W. Doose was her son, born of said marriage, and that he was eighteen years of age; that she continued to live with complainant as his wife from the time of the marriage "up to the time I went to the hospital, December 1, 1913"; that for the past two years, and over, complainant had been cruel and abusive towards her; that in the month of April about two years ago complainant, while in anger, grabbed her by the throat and choked her and hurt her; that her son was present at the time; that on three subsequent occasions complainant was guilty of acts of cruelty and physical violence

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towards her; that the last of such acts was "about three weeks before I went to the hospital"; that on that occasion "he choked me and started to abuse me, and when I screamed he put a pillow over my head so that no one could hear"; that while he was so holding the pillow her son, Carl, came into the room; and that complainant frequently used profane language, particularly during the last two years. Carl W. Doose testified to seeing his father, while in a fit of anger, choke his mother about two years previously, and also on the last occasion to seeing his mother lying down and his father holding a pillow over her head. During the hearing counsel for cross-complainant stated, in substance, that he was not going to introduce any testimony as to property rights; that an agreement had been made with counsel for complainant (present in court) as to the distribution of the property, provided, of course, that a decree of divorce should be granted; that a deed of certain property had been placed in escrow with a certain Chicago bank and that after the decree was entered that would settle the matter. The cross-complainant further testified that she understood all the details of the agreement as to the division of the property and that she was satisfied with the arrangement.

On April 15, 1914, the court entered a decree, in which it was adjudged that complainant's bill be dismissed for want of equity and that complainant pay all the costs of the litigation; that under the cross-bill the bonds of matrimony theretofore existing between the parties be dissolved, and that each of the parties be barred from all dower and homestead in any real estate owned or hereafter acquired by the other. The court found in the decree that both parties had agreed in open court to an immediate hearing and were present on the hearing; that since their marriage they had lived together as husband and wife until on or about December 1, 1913, when cross-complainant left

complainant, and that since said time they have not lived together as husband and wife; that complainant had been guilty of extreme and repeated cruelty towards cross-complainant; and that the parties had agreed to a division of property as and for a complete settlement of the rights either might have in the property of the other, whether for alimony, maintenance, dower or homestead. The decree, as entered bears the "O. K." of the respective solicitors of the parties. The transcript of the record further discloses that on the same day, April 15, 1914, on motion of the solicitor for complainant or cross-defendant, it appearing that all costs had been paid, the court ordered the clerk of the court "to satisfy of record the decree of divorce entered this day." The present writ of error was sued out of this court by said Charles E. Doose on February 2, 1915.

BENNISON F. BARTEL, for plaintiff in error, did not represent plaintiff in error below.

CHURCH, SHEPARD & DAY, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

The errors assigned may be summarized as follows: That the court erred in entering the decree on the cross-bill (1) because the evidence of the alleged acts of extreme and repeated cruelty on the part of cross-defendant towards cross-complainant is not sufficient to warrant a decree of divorce; and (2) because, even if sufficient, it appears from the allegations of the cross-bill and from the testimony of cross-complainant that she had condoned said acts.

As to the first point we are of the opinion that the evidence of extreme and repeated cruelty on the part of cross-defendant is sufficient to warrant the decree.

Regarding the second point, counsel's argument, as

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we understand it, is, that as it appears from the testimony of cross-complainant that the last act of cruelty complained of occurred about *three weeks before* December 1, 1913, on which date she went to a hospital, and as it further appears from her testimony that she continued to live with cross-defendant as his wife until December 1, 1913, the acts of cruelty were condoned. Under the facts and circumstances of this case we do not think that she is barred from obtaining the relief granted by the decree.

“Condonation is defined in the books as forgiveness, *upon condition* the injury shall not be repeated, and is dependent upon future *good usage* and *conjugal kindness*.” (*Farnham v. Farnham*, 73 Ill. 497, 500.) “The authorities hold that condonation is not so strict a bar against a wife as against a husband, inasmuch as she may find it difficult to quit the common domicile, and often submits through necessity. Hence, condonation on the part of the wife is not pressed with the same vigor as condonation on the part of the husband.” (*Duberstein v. Duberstein*, 171 Ill. 133, 136.) “Forbearance to abandon him and sue, does not weaken her title to relief.” (*Harrison v. Harrison*, 20 Ala. 629, 646.) In *Phillips v. Phillips*, 1 Ill. App. 245, 249, it is held that the two offenses of adultery and extreme and repeated cruelty are essentially different in their nature, and that the same consideration, as respects condonation, cannot be equally applicable to both. In 9 Ruling Case Law, p. 384, it is stated: “To constitute a revival of the condoned offense the offending spouse need not be guilty of the same character of offense as that condoned; *any misconduct* is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied.” (See *Langdon v. Langdon*, 25 Vt. 678, 679.) In the *Farnham* case, *supra*, a decree for divorce was granted the wife on the ground of extreme and repeated cruelty. On appeal by the husband it was contended

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that the cruelty had been condoned. Our Supreme Court, in affirming the decree, said (p. 500): "No acts of personal violence are proven subsequent to the alleged condonation, but there is evidence of abusive treatment by the use of opprobrious epithets. * * * Cruel treatment does not always consist of actual violence. There are words of false accusation, that inflict deeper anguish than physical injuries to the person—more enduring and lacerating to the wounded spirit of a gentle woman, than actual violence to the person, though severe." (See also, *Sharp v. Sharp*, 116 Ill. 509; *Robbins v. Robbins*, 100 Mass. 150.) In the present case the record discloses that the last act of physical violence committed by cross-defendant on the person of his wife was committed three weeks before December 1, 1913; that during the three weeks subsequent to the commission of said act she continued to live with him; that on December 1, 1913, she went to a hospital and did not afterwards return to him but continued to live separate and apart from him; that within two months after she went to the hospital he filed a bill for divorce against her in the Superior Court, in which he publicly charged her with serious acts of extreme and repeated cruelty towards him, which charges, if untrue, probably wounded her deeply; and that when the cause was called for trial, and after her cross-bill had been filed, he made no attempt to prove his charges against her and did not dispute her testimony as to his cruelty. If his repeated acts of cruelty were condoned by her for the reason urged, we are of the opinion that his conduct towards her, so far as disclosed, subsequent to her going to the hospital, does not show "good usage and conjugal kindness," and that her condonation, if any there was, is no bar to her obtaining the relief of an absolute divorce. Furthermore, the cross-defendant in his answer to the cross-bill of his wife did not plead the alleged condonation as a defense, and the point was not urged or even mentioned on the hearing.

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In 9 Ruling Case Law, p. 386, it is stated: "Condonation is an affirmative defense and like other affirmative defenses must be specially pleaded or insisted upon in the answer as a defense. * * * Though condonation is not specially pleaded or relied on as a defense, the court may in its discretion refuse to grant a divorce, where it appears from the proofs, properly taken, that the injured party, with a full knowledge of all the facts, has actually forgiven the injury, which has not been revived by subsequent misconduct. * * * The court should not, it would seem, exercise its discretion in this regard in order to deprive a much suffering wife of a divorce." (See also, *Watkinson v. Watkinson*, 68 N. J. Eq. 632, 638; *Smith v. Smith*, 4 Paige (N. Y.), 432, 434; *Hoffmire v. Hoffmire*, 7 Paige (N. Y.), 60).

It is also urged that the decree should be reversed because it appears that an arrangement existed between the parties as to a division of the property in the event a decree of divorce should be granted. We do not think that it can be inferred from the fact of the existence of such an arrangement as to *property* that there was collusion to obtain a *divorce*.

The decree of the Superior Court is affirmed.

Affirmed.

Albert J. Kraetsch, Appellant, v. City of Chicago, Appellee.**Gen. No. 21,255.**

1. **BILLS AND NOTES, § 306***—*when maker making second payment after failure of drawee may recover amount of payment from payee.* Where plaintiff in action of assumpsit gave defendant, the City of Chicago, a cashier's check on a certain date to pay for saloon licenses from such city and, although accepted on such date, it was not presented for payment until over three weeks later, and the evidence showed that if presented at the bank on which it was drawn at any time up to and including the day before such latter date it would have been paid, but that such bank failed on the day of presentation, and plaintiff did not consent that defendant might delay the due presentment of said check for any reason and had no knowledge of any practice of defendant to hold such checks until the receipt of report from its police department and, under protest and because of threats of arrest the plaintiff six weeks after the issuance of the check again paid defendant \$1,000 on account of such licenses, *held* plaintiff was entitled to recover a judgment for such \$1,000.

2. **PAYMENT, § 5***—*when acceptance of check operates as payment of debt.* The acceptance of a check of a third party implies an undertaking of due diligence in presenting the check for payment, and in case of loss through want of due diligence such acceptance will be held to operate as payment.

3. **BILLS AND NOTES, § 279***—*what constitutes due diligence in presentation of check.* Due diligence on the part of the payee of a check of a third person requires it to present same for payment on the same day, or, at the furthest, within banking hours on the next day after the check is delivered to it.

4. **PAYMENT, § 5***—*when acceptance of check operates as payment.* In the absence of an agreement to the contrary, a check received for a debt is merely conditional payment, or satisfaction of the debt when paid; but the acceptance of such check implies an undertaking of due diligence in presenting it for payment, and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment.

5. **CUSTOMS AND USAGES, § 21***—*when custom of holding checks for license fees not binding on debtor.* The custom of the City of Chicago of holding a check for license fees of saloon until the receipt

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of a favorable report from the police department, in order to bind plaintiff, a saloon keeper, must have been actually known to him when the check of a third person for a certain amount was delivered in order to justify the obtaining of a similar sum.

6. CUSTOMS AND USAGES, § 27*—*when evidence insufficient to show knowledge of custom of holding checks by city until it receives favorable report on applicant for saloon license.* In an action of assumpsit by a saloon keeper against a city to recover the amount of a second payment made by plaintiff to defendant after failure of drawee, evidence held not to show that plaintiff had knowledge of defendant's custom of holding checks given in payment of saloon license fees until receipt of a favorable report from the police department.

7. CUSTOMS AND USAGES, § 21*—*when notice to agent of custom not binding on principal.* Where an agent of a saloon keeper merely acts as a messenger in delivering a check for license fees to the city collector, even though such messenger had knowledge of a custom on the part of such city collector of holding such checks until receipt of a report from the police department, such knowledge held not to be notice to plaintiff and as not binding upon him.

8. ESCROWS, § 6*—*what does not constitute delivery of check in escrow.* By the terms of a Chicago city ordinance, and by usage and practice in the city collector's office, payment of a saloon license fee is required before May 1st, and the acceptance of a check in compliance with that requirement does not cause the delivery of such check to be in the nature of an escrow agreement even though such city collector claims that such checks are withheld from presentation pending the receipt of a report from the police department as to the validity of signatures on plaintiff's saloon license.

9. ESCROWS, § 6*—*what does not constitute delivery of a check in escrow.* Delivery of a check in payment of city saloon license fees to a city held not to be in the nature of an escrow agreement, the essential requirement of an escrow being that delivery can be made only to a stranger and not to a party or his authorized agent.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and judgment here with finding of facts. Opinion filed March 28, 1916. Rehearing denied April 10, 1916.

Statement of the Case.

On June, 17, 1914, Albert J. Kraetsch, plaintiff, commenced an action in assumpsit against the City of Chicago, defendant, to recover back the sum of \$1,000

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

which he alleged he paid to defendant on June 12, 1914, *under protest* and because of threats of arrest, etc., for license fees for the period of six months for two saloons operated by him, one on West 63rd street and the other on West 74th street in said city, and which fees he further alleged he had previously, on April 29, 1914, paid defendant by a cashier's check accepted by it. The cause was tried before the court without a jury. Some of the facts were presented to the court by stipulation of the parties, and other facts appeared from the testimony of witnesses. On November 27, 1914, the court found the issues for the defendant, overruled plaintiff's motions for a new trial and in arrest of judgment and entered judgment for costs against the plaintiff, who by this appeal seeks to reverse that judgment and have this court enter a judgment here in his favor against the defendant for \$1,000.

The material facts are in substance as follows: The locations of the two saloons were in a district where it was required to have a petition, signed by a majority of citizens and legal voters residing within a radius of one-eighth of a mile of the saloon, requesting that a license be granted. It was the practice where such signatures were required to have the saloon keeper deliver such petition to the police department at the police precinct in which the saloon was located about fifteen days prior to the commencement of the license period, in order to have the signatures verified by said department; and subsequently, after verifying such signatures, said department sent such petition to the city collector's office with its recommendation for or against the issuance of the license. In the present case it appears that plaintiff delivered the respective petitions of citizens and voters as to said saloons to the police department about April 15, 1914. During the months of April and May of that year plaintiff was a depositor in the Ogden Park Bank, a private bank,

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located in the City of Chicago and conducted by one Baumgartner and doing a general banking business. Plaintiff had a checking account with the bank, and on April 29, 1914, the bank, at plaintiff's request, issued and delivered to him its cashier's check for \$1,000, payable to "Edward Cohen, city collector," and the amount of the check was charged to plaintiff's account with the bank. On the same day, April 29th, plaintiff, having previously made applications in writing at the office of the city collector, Edward Cohen, for the issuance of licenses to operate each of the saloons at said locations for the period from May 1 to October 31, 1914, filed with said city collector the required bonds, etc., and also by an agent named Hinkamp delivered to said city collector said check for \$1,000 *in payment* of the \$500 license fee for each saloon. The city collector accepted said applications, bonds, etc., and said check, but the licenses were not then issued for the reason that said official had not received the reports of the police department as to the verification of the signatures on the petitions above mentioned. The city collector held said check *without cashing or depositing the same* until May 21, 1914, when he turned the same over to the city treasurer, who, on the same day, deposited it in the Illinois Trust & Savings Bank, located in Chicago, to the credit of defendant, which bank delivered said check on May 22nd to the First National Bank of Englewood, also located in Chicago, which last named bank on the last named day gave a package of checks, drawn on or payable at the Ogden Park Bank, to its messenger for collection, together with a slip showing the separate and total amount of the checks in said package. On the same day the messenger, without examining the checks in said package to see if they corresponded with the amounts mentioned on the slip, shoved the package and slip through the paying teller's window at the Ogden Park Bank, and the paying teller, after examining the package and not

finding therein said check for \$1,000; refused for that reason to pay the check. On the following morning, May 23, 1914, the Ogden Park Bank failed and closed its doors. It clearly appears from the evidence that from the time of the issuance on April 29th of said cashier's check up to and including May 22nd, said Ogden Park Bank had sufficient funds on hand available for the payment thereof, and that had it properly been presented for payment at said bank at any time up to and including May 22nd it would have been paid. The defendant, City of Chicago, never received the \$1,000 on said check or any part thereof, and the check has never been returned to plaintiff.

It further appears that, by ordinance of the City of Chicago relative to the issuance of saloon licenses, the saloon license year is divided into two periods—the first period being from May 1st to October 31st, inclusive, and the second period being from November 1st to April 30th, inclusive, of the following calendar year, and that the fee for each period of six months is \$500, payable *in advance*. A deputy city collector, J. F. McCarthy, in charge of the issuance of saloon licenses, testified in substance that by the usage or practice of his office applications for licenses may be presented at any time, but that the license fee for the first period *must* be paid before May 1st, “even though we have not completed our investigations”; that when a voters' petition is required it is the practice not to issue the license until the police department makes its report as to the verification of said petition and its recommendation, and to hold the money or check given in payment of the license fee until the receipt of such report; that no license is issued “unless we have the money for it, or something that represents money”; and that in payment of a license fee either currency, or a cashier's check, or a certified check, or even an uncertified check, is accepted.

It further appears that, under date of April 20, 1914,

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said city collector by communications in writing referred the applications for the two licenses to the police department for its verification and recommendations; that the application as to the saloon on West 63rd street was not returned to the city collector's office until May 20, 1914, in which return said department recommended the granting of the license; and that the application as to the saloon on West 74th street was not returned until May 27, 1914, and that as to it said department also recommended the granting of the license. It further appears from the testimony of J. F. O'Brien, cashier in the city collector's office, that on May 20, 1914, after the return of the favorable report of the police department as to the saloon on West 63rd street, he (O'Brien) received from said deputy collector, McCarthy, the two bonds which accompanied the respective applications and said cashier's check for \$1,000; that one bond was all right and the one license was ready to be issued, but on the other bond there was a notation that the application had not yet been returned by the police department with its recommendation, and that he should hold \$500 with said other bond; that he deposited said check with the city treasurer the next morning (May 21st) and that he (O'Brien) "put \$500 in currency aside" with said other bond which he was holding.

It further appears that after both licenses were ready to be issued the defendant refused to issue the same to plaintiff unless he paid defendant the further sum of \$1,000, as license fees; that defendant threatened to prevent plaintiff from operating said saloons without said licenses and to cause plaintiff's arrest therefor unless he made such payment, and that on June 12, 1914, plaintiff, under protest, paid defendant said further sum of \$1,000, in order to procure the issuance of said licenses for said period.

Defendant in its affidavit of merits filed with its plea of the general issue to plaintiff's declaration and af-

fidavit of claim, stated as ground of defense that "when plaintiff paid said check into the office of the city collector he *well knew* that the city collector must necessarily hold the check until such time as the officers of the city could investigate the validity of the signatures on plaintiff's saloon petition, and if any delay was caused in the depositing of said check it was caused by and with the consent of plaintiff."

On this issue, as to plaintiff's knowledge of the custom or practice in the city collector's office, as testified to by McCarthy, of holding checks given by applicants for licenses until the police department investigated and reported as to the validity of the signatures on petitions, where such petitions and signatures are required, such knowledge was not shown. Neither was it shown that plaintiff consented to the holding of the check in question until the police department had made its said investigation and report. Plaintiff testified that he had been in the saloon business for twelve years; that he generally went to the city collector's office himself and personally got his license and that he had always in the past procured the license the same day he paid the fee therefor either in cash or by check; that at this particular time he was busy and requested Hinkamp to get the licenses for him which the latter agreed to do; and that he never knew that there was any custom or practice in said office of holding checks but knew that the money for the license had to be paid before May 1st. Hinkamp testified that when he delivered the check on April 29th at the city collector's office nothing was said to him about holding the check and that he did not know this was going to be done.

VINCENT D. WYMAN, CHARLES E. CARPENTER and O. W. JURGENS, for appellant.

RICHARD S. FOLSOM, for appellee; LEON HORNSTEIN, of counsel.

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MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Counsel for plaintiff contend that the trial court erred in entering judgment against the plaintiff and should have entered a judgment for \$1,000 against the defendant. After careful consideration of the facts of this case and the law applicable thereto we agree with the contention.

The cashier's check of \$1,000 in question was that of a third party; it was made payable directly to the city collector; and it appears to have been accepted by the city collector in lieu of cash. The ordinance of the City of Chicago provides that the license fee of \$500 for the period of six months beginning on May 1st shall be paid *in advance* and it is shown by the testimony of a deputy city collector that the payment of such fee before May 1st is absolutely required. The check was accepted on April 29th, but it was not deposited for collection by the defendant until May 21st, and not presented for payment prior to the failure of the Ogden Park Bank on May 23rd. And the evidence shows that had it been presented at that bank at any time up to and including May 22nd it would have been paid. We understand it to be the law that the acceptance of a check of a third party implies an undertaking of due diligence in presenting the check for payment and that in case of loss through want of due diligence such acceptance will be held to operate as payment. In *Brown v. Schintz*, 202 Ill. 509, 514, the court says, quoting from Story on Promissory Notes: "If a creditor accepts the note of a third person, or draft or bill, though not in payment, he accepts the duty of doing everything necessary to fix the liability of the parties to the paper." And the court further says (p. 515), quoting from Daniel on Negotiable Instruments: "The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered.

But if the party receiving it is guilty of laches in presenting it, and the bank in the meantime suspends payment, he thereby makes it his own and it shall operate as payment of his debt, the drawer having funds in the bank at the time of drawing the check and not having withdrawn them." In the present case, the bank and all parties interested being located or residing in the City of Chicago, due diligence on the part of defendant required it, as payee of the check in question, to present the same for payment on the same day, or at the furthest the next day, within banking hours, after the check was delivered to it. (*Brown v. Schintz, supra; Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 244.) In *Kilpatrick v. Home Building & Loan Ass'n*, 119 Pa. St. 30, 36, it is said: "In the absence of an agreement to the contrary, a check or promissory note, of either the debtor or a third person, received for a debt, is merely conditional payment, that is, satisfaction of the debt, if and when paid; but the acceptance of such check or note implies an undertaking of due diligence in presenting it for payment, etc., and if the party from whom it is received sustains loss by want of such diligence, it will be held to operate as actual payment." (See also, *Manitoba Mortgage Co. v. Weiss*, 18 S. D. 459; *Smith v. Miller*, 43 N. Y. 171, 176.) We know of no reason why in this case the above well-settled rules of law are not applicable to the defendant, City of Chicago.

While the testimony of the deputy city collector, McCarthy, tended to show that it was the custom or practice of his office not to issue a saloon license, and to hold the money or check accepted in payment of the license fee, until receiving the report of the police department as to the validity of the signatures on the voters' petition where such signatures were required, still the evidence does not show that plaintiff, or his agent Hinkamp, had knowledge of that custom or practice, or that either knew when the check was de-

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livered that it would be held and not deposited until the receipt of a favorable report of the police department as to said signatures by the city collector, or that either consented to such action. The custom or practice, in order to be binding on plaintiff, must have been actually known to him when the check was delivered. (*Bank of Commerce v. Miller*, 105 Ill. App. 224.) And even if Hinkamp, who simply acted as a messenger for plaintiff to deliver the check to the city collector's office, had knowledge that there was such a custom or practice (as counsel for defendant contend his testimony tends to show he did), we do not think that such knowledge on Hinkamp's part would, under all the testimony, be notice to plaintiff and binding upon him. (31 Cyc. 1648; *Burton v. Perry*, 146 Ill. 71, 118; *Snyder v. Partridge*, 138 Ill. 173, 184.)

And we do not think there is any merit in the contention of counsel for defendant that the delivery of the check was in the nature of an escrow agreement. By the terms of the city ordinance, as well as by the usage or practice in the city collector's office, payment of the license fees was required before May 1st, and the check was accepted as a compliance with that requirement. Furthermore, one of the essential requirements to a deposit in escrow is that the delivery can be made only to a stranger and not to a party or his authorized agent. (16 Cyc. 571; *Worrall v. Munn*, 5 N. Y. 229; *Baum v. Parkhurst*, 26 Ill. App. 128; *Ryan v. Cooke*, 68 Ill. App. 592.)

The judgment of the Superior Court is reversed and judgment is entered here in favor of the plaintiff, Kraetsch, and against the defendant, City of Chicago, for the sum of \$1,000.

Judgment reversed and judgment here.

Finding of Facts: We find as facts that on April 29, 1914, plaintiff by an agent delivered to defendant, and defendant accepted, the \$1,000 check in question in payment of license fees for two saloons; that neither

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plaintiff nor his agent consented that defendant might delay the due presentment of said check for any reason; that plaintiff had no knowledge of any custom or practice of defendant to hold such checks until the receipt of any report from its police department; that defendant held said \$1,000 check, and made no attempt to have the same presented for payment, until May 21, 1914; that because of such delay in presentment the money on said check was not received by defendant; and that on June 12, 1914, plaintiff again paid defendant, under protest and because of threats of arrest, the sum of \$1,000 for said license fees for said two saloons.

E. E. McCarthy and C. P. Lardie, trading as McCarthy & Lardie, Appellants, v. Chicago & Northwestern Railway Company, Appellee.

Gen. No. 21,264. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. FRANK G. PLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916.

Statement of the Case.

Action in assumpsit by E. E. McCarthy and C. P. Lardie, trading as McCarthy & Lardie, plaintiffs, against Chicago & Northwestern Railway Company, defendant, for damages for injury to three cars of potatoes. From a judgment in favor of defendant, plaintiffs appeal.

The potatoes were loaded into three cars at Spencer, Michigan, from which point they were consigned over the route designated "Ludington & C. & N. W.," in

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bills of lading issued by the Pere Marquette Railroad Company on January 30, 1912, which bills of lading showed the potatoes to have been received in apparently good order. After being conveyed to Traverse City, Michigan, and to Ludington, Michigan, they were ferried across Lake Michigan, arriving in Manitowoc, Wisconsin, on February 2, 1912, on which day the temperature ranged from 15 degrees above to 7 degrees below zero, and on the following day from 3 degrees above to 16 degrees below zero. Plaintiffs' agent and caretaker, C. E. Martin, testified that he rode in the cars from Traverse City to Chicago and kept a hot fire in the stove in each car at all times.

A telegram saying, "We will stand the loss if any by *freezing*; send cars forward *today*, to Grand Avenue, Chicago," was received by defendant's agent at Manitowoc at 1:15 p. m. on February 2nd, and the cars were received by defendant at 2:30 p. m. the same day. The cars were hauled to defendant's freight yard where they remained until 4 p. m., February 3rd, whence they left for Chicago, arriving there on February 5th.

At about noon on February 2nd, B. A. Little, assistant freight claim agent of defendant at Chicago, informed E. E. McCarthy, one of the plaintiffs, that on that morning defendant had wired instructions to its agents at certain junction points, including Manitowoc, not to receive perishable goods from shippers on connecting lines on account of the weather conditions.

Subsequently, on the same day, plaintiffs again wired defendant's freight agent at Manitowoc as follows: "Put cars we wired on this morning in roundhouse. Wait instructions from Mr. Little." This telegram was received by defendant's said agent at 4:17 p. m. It did not appear that any instructions were afterwards received by said agent from Little or that Little was to send any. Defendant maintained a

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roundhouse at Manitowoc. It contained only four stalls, each stall capable of housing one engine or one freight car, and defendant there had no other facilities for "roundhousing" engines or cars containing perishable goods. On the night of February 2nd, two of defendant's engines were put in said roundhouse and two freight cars, of the refrigerator type having no stoves therein, containing perishable goods. It appeared that it is not the custom to "roundhouse" any car containing perishable goods where the car has false bottoms and sides and a stove therein and an attendant to maintain the fires, as was the case with the cars in question. It further appeared from the testimony of plaintiffs' caretaker, Martin, in charge of the heating of the cars, that when freight train No. 180, scheduled to leave Manitowoc on the afternoon of February 2nd, finally arrived from the north about 2 o'clock on the morning of February 3rd, he heard the conductor of the train say that he could not put the three cars in said train for the reason that "he had his tonnage," which meant that he then had in his train all the cars he could haul on his division; that the cars in question remained in the yard exposed to the cold wind; that notwithstanding he kept a hot fire in the cars all the time some of the potatoes at the ends of the cars were frozen on February 3rd and before they left Manitowoc; and that they were in good condition and not frozen when they arrived in Manitowoc. It further appeared from the evidence that shortly after the arrival of the potatoes in Chicago, on February 5th, the same were sold, and that solely because of their frozen condition plaintiffs sustained a loss of about \$773. It did not appear, however, that plaintiffs suffered any damages by reason of any unreasonable delay, if such delay there was, in the delivery of the potatoes at Chicago.

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CHARLES A. BUTLER, for appellants; FRANKLIN RABER, of counsel.

C. A. VILAS and I. C. BELDEN, for appellee; WILLIAM G. WHEELER, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 139*—*when evidence sufficient to establish that carrier had not breached its contract to carry produce safely.* In an action of assumpsit for damages for injury to three carloads of potatoes, evidence held sufficient to establish that the railroad company had not failed in the performance of its implied contract to safely carry plaintiffs' potatoes, it appearing that plaintiffs wired defendant's agent, before the cars were received by defendant, to accept the cars, that any loss by freezing would be stood by plaintiffs, that weather conditions were severe, and that the cars were heated by stoves in charge of plaintiffs' caretakers.

2. CARRIERS, § 121*—*when shipper assumes liability for loss by freezing of produce.* A telegram from plaintiffs to the agent of defendant railroad to accept cars and that they would stand any loss to the potatoes by freezing, held not to be construed as only meaning that plaintiffs would relieve defendant from its liability as an insurer and not from liability resulting from negligence, but that such telegram and the action of defendant thereafter in accepting such cars should be considered as in the nature of a special agreement between the parties whereby they proposed to defendant that if it would accept the cars at once they would assume loss by freezing, it appearing that plaintiffs were anxious to get the potatoes to destination as quickly as possible, and knew of severe winter weather conditions whereby the cars might be held up at a ferry landing, and that cars were heated and in charge of caretaker.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. James Thomas and Joseph E. Snowden. Joseph E. Snowden, Plaintiff in Error.

Gen No. 21,285. (Not to be reported in full.)

Error to the Criminal Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed March 28, 1916. Rehearing granted and opinion filed April 28, 1916.

Statement of the Case.

Action by the People of the State of Illinois against James Thomas and Joseph E. Snowden, defendants, on a recognizance taken in open court in the sum of \$1,000 which was forfeited by the nonappearance of the principal, James Thomas. From a judgment on such recognizance in favor of the People, defendant Joseph E. Snowden brings error.

Joseph E. Snowden became surety on a recognizance taken in open court in the sum of \$1,000 which was forfeited because of the nonappearance of the principal, James Thomas, in the Cook county Criminal Court. Thereafter, on February 8, 1913, judgment was entered in favor of the People against Thomas and Snowden in the sum of \$1,000 and costs. To reverse the judgment, Snowden on February 27, 1915, sued out writ of error and moved that same be made a *supersedeas*, filing with the motion certain written suggestions, which motion was on May 1, 1915, allowed by the Appellate Court.

It appeared from the original transcript of the record that Thomas was indicted by the grand jury of Cook county for larceny; that Thomas, with Snowden as surety, entered into said recognizance; that Thomas did not appear and the recognizance was declared forfeited and a writ of scire facias ordered to be issued for them to show cause why the forfeiture should not

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be made absolute, and that on February 8, 1913, the Criminal Court entered an order reciting that "the writ of scire facias issued herein has been duly returned by the Sheriff of Cook county," etc., and declaring that said forfeiture be made absolute and entered said judgment. Nowhere in the original transcript of the record was there contained any writ of scire facias.

GEORGE W. BLACKWELL, for plaintiff in error; GEORGE H. SUGRUE, of counsel.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

BAIL, § 91*—*when trial court has no jurisdiction to enter final judgment on recognizance.* The trial court has no jurisdiction to enter final judgment on a recognizance which was forfeited by the nonappearance of the principal, where the writ of scire facias is not served upon the surety until the first day of the term at which it is returnable.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rudolph Eller, Appellee, v. Frances A. Eller, Appellant.

Gen. No. 21,308. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916. Rehearing denied April 10, 1916.

Statement of the Case.

Bill for divorce by Rudolph Eller, complainant, against Frances A. Eller, defendant. From a decree for complainant, defendant appeals.

The decree appealed from granted the husband a divorce on the ground of extreme and repeated cruelty, dismissed the wife's cross-bill for separate maintenance, directed partition of certain real estate owned by them as tenants in common, and appointed a receiver to collect the rents from the property pending the partition proceedings. Defendant contended that the decree was against the clear preponderance of the evidence, that the cross-bill was supported by the greater weight of the evidence, that the court had no jurisdiction to make partition or appoint a receiver.

The decree found that the wife had since their intermarriage been guilty of extreme and repeated cruelty substantially as charged in the bill of complaint, that she was a woman of great austerity of temper, that she indulged in violent sallies of passion, that she had on two occasions used personal violence towards her husband, striking him once a violent blow in the face resulting in pain and loosening his teeth and at another time on his hand with a heavy hatchet, bruising it and causing pain; and that she used towards him opprobrious, obscene and abusive language without provocation, and maliciously and without

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reasonable cause accused him of having unlawful sexual intercourse with one of his tenants. Against the evidence of seven witnesses as to her use of opprobrious epithets and abusive language towards him, there was her bare uncorroborated denial, and against three witnesses charging him with similar language towards her, there was his bare denial. The motives and interests of these several witnesses were not disclosed in the record.

Her version as to both incidents of physical violence was supported by her son, who took an active part in her behalf in one of them, her daughter and another witness, as to one occasion, and her daughter and son-in-law, as to the other occasion, corroborated in the main his version of the affairs. The main acts of cruelty charged by her against him were parts of the same incidents relied upon to establish his charges of the same character. There was evidence of intentional commission without just provocation of two distinct acts of physical violence against him of a painful and serious character, while she was in a state of ungovernable temper and evincing an utter disregard of any danger that might attend them. There was evidence showing the history of their family troubles apparently began over money matters in which he was seemingly fair and generous, and showing that he had always evinced a kind and peaceable disposition towards her and her children by a former marriage, and that she was a large, strong woman, of high temper and wilful quarrelsome disposition, given to vituperative and vulgar language towards him and his tenants (all of whom testified for him and against her), and that she had evinced a manifest disposition to get hold of his property and to get rid of him, and had previously without good grounds filed a bill for separate maintenance, which she dismissed, containing unjustifiable charges against him, and that he was at the time of trial nearly seventy years old (her senior by about eighteen years).

Eller v. Eller, 198 Ill. App. 411.

ALONZO M. GRIFFEN and ROBERT E. BERLET for appellant.

CHYTRAUS, HEALY & FROST, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 45*—*what constitutes preponderance of evidence in favor of plaintiff.* There being sufficient evidence on which to base each finding in a decree for divorce, whether such evidence preponderates in complainant's favor depends upon the credibility of witnesses.

2. WITNESSES, § 261*—*how credibility determined.* The opportunity to see as well as hear is of the greatest importance in determining the weight and credibility of evidence.

3. DIVORCE, § 77*—*when decree in divorce action not disturbed on appeal.* Charges in bill and cross-bill being of same nature and character, and the evidence irreconcilably conflicting at most essential points, thus requiring close consideration of the witnesses' credibility, the Appellate Court will not disturb the decree or analyze the evidence.

4. DIVORCE, § 47*—*when evidence sufficient to show cruel and inhuman treatment of husband by wife.* On a bill for divorce by a husband, evidence held sufficient to establish extreme and repeated cruelty of wife to husband.

5. DIVORCE, § 144*—*when court jurisdiction to partition real estate of husband and wife.* A court in divorce suit may make partition of real estate of husband and wife.

6. DIVORCE—*when settlement of controversy as to real estate conclusive upon parties.* Where parties in divorce suit by mutual agreement settle all controversies and questions respecting their real estate, and it is so found in the decree, they cannot afterwards raise such question on its merits.

7. APPEAL AND ERROR, § 429*—*when question of multifariousness not properly raised on appeal.* Question of multifariousness in pleading in divorce suit is improperly raised in the Appellate Court for the first time.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dyke v. Petty, 198 Ill. App. 414.

**Theron J. Dyke, Appellant, v. Milton E. Petty et al,
Appellees.**

Gen. No. 21,319. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916. Rehearing denied April 10, 1916.

Statement of the Case.

Proceedings on motion by Milton E. Petty, Henry E. Petty and John McFeely to vacate a judgment taken against them by default in favor of Theron J. Dyke, plaintiff. From an order vacating such judgment, plaintiff appeals.

The order was based on a motion in writing made at a subsequent term in behalf of said Milton E. Petty to correct an alleged error in fact, under section 89 of the Practice Act (J. & A. ¶ 8626). The basis of the proceeding was the contention that said Petty was mentally incapacitated when served with summons and remained so until after judgment. The request of plaintiff for an oral hearing was denied, and the hearing was had on affidavits.

There were two affidavits in support of the motion and two counter affidavits. The former were by physicians, who attended on said Petty in the period referred to, and contained positive, unqualified averments that he was then wholly irresponsible and mentally incapacitated. The counter affidavits were, one by the deputy sheriff, who expressed a contrary opinion, and one by plaintiff's counsel containing matter almost entirely hearsay in character.

EDWARD MARSHALL, for appellant.

No appearance for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 280*—*when court does not abuse its discretion in refusing oral hearing on motion to vacate.* While on a motion to vacate a judgment on account of mental incapacity of one of the defendants, an oral hearing may be had in the discretion of the court under the Practice Act, Hurd's Rev. St., ch. 110, sec. 89 (J. & A. ¶ 8626) *held* that there was no abuse of discretion in denying the request and holding the hearing on affidavit.

2. JUDGMENT, § 295*—*when order vacating judgment not disturbed for failure to include formal finding of fact.* Where an order to vacate a judgment, on the ground that one of the defendants thereto is mentally incapacitated, does not include an express finding of fact, but the issue of such defendant's mental incapacity is the only one raised, and the order is justified by affidavits of persons most capable of judging of mental conditions, it will not be disturbed because of such informality.

Albert Hertel, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,335. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed on remittitur. Opinion filed March 28, 1916.

Statement of the Case.

Action by Albert Hertel, plaintiff, against Chicago City Railway Company, defendant, to recover damages for personal injuries. From a judgment for \$4,000 in favor of plaintiff, defendant appeals.

Hertel, the plaintiff, was a passenger on one of defendant's cars that in a backward movement collided

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hertel v. Chicago City Ry. Co., 198 Ill. App. 415.

with a wagon and horses attached to it. He was probably thrown from the car and sustained injuries therefrom.

The declaration charged that the motorman of the car "wrongfully, improperly and negligently caused the car to be suddenly and quickly started and in a backward direction, and to be operated swiftly in a backward direction" against a certain wagon in the rear of said car. -

The car was an open, light summer car operated by electricity. To avert a collision with a wagon that was suddenly turned in front of it the motorman applied the reverse power thus causing the car to stop and run backward probably about one hundred feet to the point where the collision occurred. The motorman testified that the reason why he could not stop the car in its backward movement was because the reverse lever became stuck so that he could not move it back, and that he failed both to shut off the electric power and to apply the brake after the car started backward.

The passenger's principal injury seems to have been the dislocation of his arm which was immediately set. He was laid up in bed for seven weeks when his doctor told him he could go to work and he resumed labor of the same kind in which he had been previously engaged, that of sausage making, and in which he remained at undiminished wages for about a year, when he laid off for four months, claiming that he had pains in his arm and other parts of the body. He consulted no physician, but acting on his own judgment treated himself at home with steam baths. He then went back to the work of sausage making for three months. Why he left it does not appear, unless to take the easier work of tying pork loins together at which he was employed at the time of trial. He then got \$12 per week. Prior to the accident he received \$18. For a year after the accident his wages were from \$20 to \$25.

The accident occurred August 20, 1912. He ceased to have medical attendance and resumed work October 28th. The treatment he received from his physician aside from changing the bandage on his arm consisted of rubbing his back with medicine which his wife continued to do for four months. He had not sought nor received medical care since the accident and his physician died before the trial. Medical testimony as to his physical condition was not produced but he gave his own description of his condition. He was apparently an ignorant man with little knowledge of anatomy or the cause of bodily ills.

FRANKLIN B. HUSSEY and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

LITZINGER, MCGURN & REID, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 477*—*when evidence sufficient to sustain finding of negligence in operation of street car.* In an action by a street car passenger for damages for injuries sustained while riding on defendant's car, resulting from a collision with a horse and wagon while such car was running backward under reverse power, evidence held sufficient to warrant a finding of negligence, it appearing from the testimony of the motorman that he failed to shut off the electric power and to apply the brake after the car started backward.

2. DAMAGES, § 115*—*when verdict for damages for personal injuries excessive.* Verdict for \$4,000 damages on account of dislocation of plaintiff's arm, held, under evidence, to be excessive unless a remittitur of \$1,000 was entered, it appearing that there was unsatisfactory evidence of the extent of plaintiff's injuries and as to how far his permanent health and ability to work were impaired.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Calabrese v. Cermak, 198 Ill. App. 418.

**Gennaro Calabrese, Appellee, v. Anton J. Cermak,
Bailiff, Appellant.**

Gen. No. 21,341. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916.

Statement of the Case.

Action in replevin by Gennaro Calabrese, plaintiff, against Anton J. Cermak, bailiff of the Municipal Court, defendant. From a judgment in favor of plaintiff, defendant appeals.

The suit was tried before the court without a jury. The court found the defendant Cermak guilty and the right of possession of the property in question in plaintiff. The property was levied on under a judgment in favor of the Common Sense Company against Calabrese's brother Vincent. No propositions of law were submitted to the court to be held as such and no question of law was otherwise presented in the record. The only question considered by the Appellate Court was the sufficiency of the evidence as to the ownership of the property.

The property levied on consisted of a soda water fountain, a show case, a safe and cash register in a drug store that had been owned and conducted by Vincent for some years. Being indebted to Gennaro he executed a bill of sale to him of the drug stock and fixtures, including said property so levied on, on September 19, 1913. Gennaro took possession on that date and sought to evidence the transaction by recording his bill of sale September 22nd. He hired a party to conduct the store and gave Vincent desk room there-

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in for another line of business. His possession seemed to have been an open one. It was conceded that no notice of the sale was previously given to the Common Sense Company. While such company had received an order from Vincent for goods prior to said sale, it did not deliver them until subsequent thereto, and there was no evidence that established either in law or fact the relationship of creditor and debtor between said company and Vincent prior to said sale.

DANIEL M. MICKEY, for appellant.

No appearance for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

REPLEVIN, § 124*—*when evidence sufficient to show ownership in plaintiff.* In a replevin action where the property levied on had been turned over to plaintiff by bill of sale, which was recorded, and such property, consisting of a soda fountain, show case, etc., in a drug store, was so given on account of indebtedness of plaintiff's brother to him and plaintiff's possession was open, and the judgment creditor on behalf of whom the levy was made did not appear to have been a creditor of plaintiff's brother prior to the sale, the evidence *held* sufficient to establish that the transaction in the bill of sale was valid and free from fraud, and that the ownership of the property was in plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Freilich v. Freilich et al., 198 Ill. App. 420.

**In re Estate of Wolf Freilich, Deceased.
Eva Freilich, Individually and as Executrix, Ap-
pellant, v. Moses Freilich and Celia Schonfeld,
Appellees.**

Gen. No. 21,352. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed March 28, 1916.

Statement of the Case.

Appeal from an order in the Circuit Court affirming, in effect, an order of the Probate Court directing Eva Freilich, as executrix of the last will and testament of Wolf Freilich, deceased, to pay out of funds in her hands, to two legatees under the will, \$1,500 each, on account of their legacies thereunder. When it was made in the Probate Court it appeared that the executrix had in her hands \$14,459.70, that the uncollected accounts of the estate were deemed worthless and that there were pending claims against the estate amounting to \$4,495.10. It also appeared that executrix had not been allowed any compensation for her services as such executrix, nor fees for her counsel. The circuit judge, on the proof before him, estimated that the latter might equal \$1,700, and from the showing of record her compensation as executrix might aggregate, on a full statutory allowance, \$7,560. The record indicated that her services as executrix extended over a considerable period and involved handling numerous transactions and large sums of money, aggregating over \$125,000, incident to closing out a merchandise business, collecting the accounts and paying the creditors.

ELIJAH N. ZOLINE, for appellant; MORRIS K. LEVINSON, of counsel.

New Columbus B. Co. v. Empire E. S. & V. Co., 198 Ill. App. 421.

NEWMAN, POPPENHUSEN & STERN, for appellees; EDWARD R. JOHNSTON and HARRY GOODMAN, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

EXECUTORS AND ADMINISTRATORS, § 340*—*when order directing payment of legacies premature.* Order of Probate Court directing executrix to pay two legacies of \$1,500 each, *held* premature where executrix had not been allowed compensation for her services or fees for her counsel, and it appearing that the funds on hand amounted to \$14,459.70, that there were claims pending against the estate aggregating \$4,495.10, and that executrix's compensation, on a full statutory allowance, might aggregate \$7,560.

New Columbus Buggy Company, Appellee, v. Empire Express Storage & Van Company, Appellant.

Gen. No. 21,365.

1. REPLEVIN, § 47*—*what constitutes sufficient demand for goods.* Where a corporation styled "The New Columbus Buggy Company" makes demand for goods in possession of another and fails to designate itself under that style but leaves out, in making such demand, the word "new," even though such technicality were availing, still where, on making such demand, defendant makes an absolute refusal to deliver the goods except on replevin, plaintiff is excused from the necessity of any further demand before bringing suit.

2. MUNICIPAL COURT OF CHICAGO, § 29*—*when presumed that rules authorize prosecution of case of first class without declaration.* Under the Municipal Court Act, sec. 28, par. 9 (J. & A. ¶ 3340), the Municipal Court of Chicago has power to adopt rules prescribing the same practice in first-class cases as in fourth-class cases; in fourth-class cases a declaration in replevin is not necessary, and indulging the presumption of regularity of procedure and that the court observed its rules, it will be assumed, until the contrary is

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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shown, that they authorized prosecution of a replevin suit in such first-class cases without a declaration.

3. REPLEVIN, § 123*—*when evidence sufficient to show that sale not bona fide.* In an action of replevin for two automobiles held by defendant as local sales agent for plaintiff under a contract to return the cars at a certain date if unsold, evidence *held* sufficient to sustain a finding that a sale of the cars to a sister-in-law of an officer of defendant was not bona fide.

Appeal from the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed March 28, 1916.

ALLAN A. GILBERT and CHARLES W. STEIFEL, for appellant; EDWARD O. BROWN, of counsel.

STEIN, MAYER & STEIN, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

This appeal is from a judgment in replevin finding the right to possession of two electric automobiles in appellee, the plaintiff, and assessing damages for detention thereof against appellant, the defendant.

Under a contract between appellee and the John A. Bender Company, as sales agent, said automobiles had been placed with the latter for sale, and appellant's defense is that the latter through John A. Bender, its secretary and treasurer, negotiated a sale thereof to one Mrs. Marshall for whom it held them in storage. The question of the right of possession depends entirely on whether the sale was a bona fide transaction, and the court before whom the case was tried without a jury must have held that it was not.

Only two points of law are raised, one relating to the necessity of a demand and the other to the necessity of a declaration. The former need not be considered as the record shows a demand in fact, and, even if it was insufficient, that none was necessary. The

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

New Columbus B. Co. v. Empire E. S. & V. Co., 198 Ill. App. 421.

point made is that the person making an oral demand of appellant for the goods failed to designate appellee by its precise corporate name because he left out the word "new." Even though the technicality were availing yet as appellant then and there made an absolute refusal to deliver the goods except on a replevin, appellee was excused from the necessity of any further demand before bringing suit.

The point as to the want of a declaration is that the suit being one of the first class cannot be prosecuted without such pleading. The Municipal Court has the power to adopt rules prescribing the same practice in first-class as in fourth-class cases (Municipal Court Act, sec. 28, par. 9, J. & A. ¶ 3340), and in the latter class a case of this character may be prosecuted on the affidavit (Id., sec. 48, J. & A. § 3360). Its rules are not before us but, indulging the presumption of regularity of procedure and that the court observed its rules, we should assume until the contrary is shown that they authorized prosecution of the suit without a declaration. This is not in conflict with *Gilman v. Chicago Rys. Co.*, 268 Ill. 305, which expressly stated (p. 310) that the decision had no application to cases arising under section 48 of said act.

As to the alleged sale relied on for a defense, we think the court was fully justified in questioning the good faith of the parties thereto. Their cross-examination developed so many suspicious and unnatural circumstances as to render the evidence of a sale not reasonably convincing.

The Bender Company was appellee's local agent. Under the contract it was to return the cars to appellee March 1, 1914, if unsold. On April 7th, appellee called for their return if not sold. April 25th it again wrote said company for returns, and, if the cars were sold, for the proceeds. Later in the month its agent personally called on Bender for information. He refused to give any, and referred the agent to the com-

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pany's attorney. A few days previous, on April 21st, Bender had personally negotiated the sale in question. He claimed at the trial that appellant owed his company a balance on account. Their relations were evidently strained.

The cars were listed to his company at \$3,400. The alleged sale was to his sister-in-law at \$2,500. While every formality of a sale was scrupulously observed the extreme care in that respect furnished additional reasons under attending circumstances for suspecting its genuineness. They lived in the same house. Yet claiming no previous conversation with him on the subject, without having owned an automobile, with little if any practical knowledge of one, without inquiry into their merits or values, she at this particular juncture of strained relations steps into the office of her brother-in-law, and without any of the usual preliminaries of a business transaction makes him an offer of \$2,500 for the cars which he immediately accepts, and forthwith he becomes her agent in placing them in storage and trying to sell them. We need not follow into their unconvincing explanations of this unusual proceeding. It is true, as claimed by appellant, that mere suspicion will not usually, if ever, justify the rejection of uncontradicted and unimpeached evidence of a satisfactory character. But the circumstances under which a transaction is entered into are frequently more persuasive in their import than the bare acts constituting it. They may of themselves be sufficient to impeach its good faith. Those in this case seemingly possess so many earmarks of a purely artificial transaction as to have rendered the evidence of the sale unsatisfactory and therefore not reasonably convincing to the court. We see no good reason for disturbing its finding. Hence the judgment will be affirmed.

Affirmed.

White Brass Cast. Co. v. Automatic Rec. Safe Co., 198 Ill. App. 425.

White Brass Castings Company, Appellee, v. Automatic Recording Safe Company, Appellant.

Gen. No. 21,375. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HOSRA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and judgment for appellee for \$3,219.93. Opinion filed March 28, 1916. Rehearing denied April 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by White Brass Castings Company, plaintiff, against Automatic Recording Safe Company, defendant, for value of merchandise delivered and cash paid out, the amount claimed as due on account being \$6,193.92, against which defendant claimed a set-off of over \$13,000. From a judgment in favor of plaintiff for \$3,519.93, defendant appeals.

Plaintiff was a manufacturer of castings and defendant was engaged in selling "little household savings banks," called safes. Under arrangements between them the former manufactured the parts and assembled them, and sent monthly bills for the same, which appear to have been paid regularly for over two years. This appeal brought up for review, the refusal of the court to allow three items of set-off, (1) one for \$300, the cost of "fillers" made by plaintiff, and delivered and charged to defendant against its protest; (2) one for \$528.67, the aggregate of an increased price of one-half cent charged on safes made and furnished between October 1, 1912 and January 1, 1914; and (3) one for \$10,285.92, being for what defendant called an overcharge for material delivered between April, 1910 and September, 1913.

Plaintiff at defendant's request made a written proposition in 1909 to manufacture the parts of the safe at certain specified prices which does not appear to have

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been acted on, defendant's secretary testifying that when it became ready to arrange with plaintiff to do its business, the latter raised its price. There was a futile effort to hold plaintiff to its original proposition. The subject of changed prices became a matter of discussion and correspondence, but the goods were billed and accepted at the changed prices up to the close of the parties' dealings, and were paid for without protest up to the accruing of the account sued on. It is the difference between the prices contained in the proposition of 1909 and said changed prices for the material furnished that constitutes the so-called overcharges in the said third item.

DYRENFORTH, LEE, CHRITTON & WILES, for appellant;
GEORGE A. CHRITTON, of counsel.

JOHN C. FARWELL, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. ESTOPPEL, § 65*—*when purchaser of goods estopped to question validity of sale.* Where a seller of goods raises prices to the purchaser above those contained in its original written proposition, even though purchaser may have been embarrassed thereby, he may not by way of set-off in a suit for the value of merchandise delivered, question the validity of the contract, especially after having given plaintiff orders on the basis of the new prices and having paid for the goods billed according to such prices.

2. ACCOUNT STATED, § 3*—*what constitutes.* Where orders are given on the basis of new prices without any binding conditions, and goods are paid for on the basis of such prices, the accounts become stated.

3. PAYMENT, § 42*—*what does not constitute mistake of fact authorizing suit to recover money paid.* Where a seller of goods induces the purchaser to accept prices on exaggerated statements of cost of manufacture and materials, but the actual arrangement is for specified prices not based on such cost, it cannot be contended

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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by way of set-off in an action for the value of goods delivered, that there was a mistake of fact whereby the right arose to recover back money paid under such mistake, and an item claimed by defendant for overcharges is properly disallowed, and evidence relating to the cost of material and manufacture properly rejected.

The People of the State of Illinois, Defendant in Error, v. Walter Speedy, Plaintiff in Error.

Gen. No. 21,498.

1. PROSTITUTION, § 3a*—*when venue properly laid in information.* Where an information for pandering designates the State, county and city, where the court exercises its jurisdiction, and in the body thereof, states that the alleged offense was committed "at the City of Chicago" aforesaid, the venue is properly laid.

2. PROSTITUTION, § 3a*—*when place where offense of pandering committed sufficiently designated.* In a prosecution for pandering, the particular house in which the offense was committed need not be designated in the information, but it is a matter of proof which could have been limited by a bill of particulars, if asked for.

3. PROSTITUTION, § 3a*—*when information charging pandering sufficient.* An information for pandering under Hurd's Rev. St., 1913, ch. 38, par. 57g (J. & A. ¶ 3863), which charges substantially in the language of the statute that defendant did by means enumerated therein "procure a female inmate for a house of prostitution," and did cause, etc., "a female person to become an inmate" of such house, and by promises, etc., caused "an inmate * * * to remain therein as such inmate" and did by fraud, etc., procure such a person "to become an inmate of a house of ill fame and to enter a place in which prostitution is allowed and encouraged within the State," and did "procure a female person to come into this State for the purpose of prostitution," states several acts, each of which constitutes the offense of pandering, and they are not inconsistent or repugnant, and they may be charged in one count.

4. PROSTITUTION, § 3a*—*when information for pandering not bad on account of duplicity.* The offense of procuring a female person to come into this State for the purpose of prostitution may constitute a distinct transaction from causing her to enter a house of prostitution or to remain therein, but they may be so connected as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to constitute but different phases of one transaction, and there being nothing on the face of an information charging such several acts, to show that they were committed at different times or were distinct and separate offenses, the information is not bad on account of duplicity.

5. PROSTITUTION, § 4*—*when admission of evidence as to bringing prostitute into the State prejudicial error on prosecution for pandering.* In a prosecution for pandering where it was charged both that defendant caused a female to enter a house of prostitution and that he induced her to come into the State for the purpose of prostitution, and the evidence tended to show that matters pertaining to her entry took place in the latter part of 1914, but evidence relating to the latter charge was to the effect that defendant sent for her in 1912 to come from another State into this State, held that the evidence indicated two distinct offenses and had no relation to the charge actually relied on, that of causing a female person to enter a house of prostitution, and in view of conflicting testimony, it was calculated to prejudice defendant with the jury, and that the admission of such testimony, over defendant's objection as to its competency, was reversible error, especially as the time was not within the statute of limitations, the information having been filed in April, 1915.

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed March 28, 1916. Rehearing denied April 10, 1916.

F. L. BARNETT, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Plaintiff in error was convicted in the Municipal Court of Chicago on an information charging him with violating the act relating to pandering. (Hurd's Rev. St. 1913, ch. 38, par. 57g, J. & A. ¶ 3863.) A motion to quash was overruled. The ruling is urged as error (1) because the venue was not properly laid; and (2)

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

because of failure to designate in what house the offense was committed; and (3) because of alleged duplicity.

As the information states in the caption thereof, the State, county and city where the court exercises its jurisdiction, and states in the body thereof that the alleged offense was committed "at the city of Chicago aforesaid," the venue was properly laid. (Vol. 1, Bish. New Crim. Proc. secs. 377-379.)

It was unnecessary to designate in what particular house the offense was committed. That was a matter of proof which could have been limited by a bill of particulars if asked for.

The information is in one count. It charges substantially in the language of the act that the defendant did by means enumerated therein "procure a female inmate for a house of prostitution" and did cause, etc., "a female person to become an inmate" of such a house, and by promises, etc., caused, etc., "an inmate of a house of prostitution to remain therein as such inmate" and did by fraud, etc., procure such a person "to become an inmate of a house of ill fame and to enter a place in which prostitution is allowed and encouraged within the State," and did "procure a female person to come into this State for the purpose of prostitution." These several acts, any one of which constitutes the offense of pandering, may be properly charged in one count, being but different means of committing the same offense and effecting the single act the statute aims to prevent, namely subjection of a female to the life of prostitution. Where there is but one offense which may be committed in different ways, they may in most instances, where not clearly repugnant, be charged in one count, and proof of the offense in any one of the ways will sustain the allegation. (Vol. 1, Bish. New Crim. Proc. sec. 586.)

There is no inconsistency or repugnancy between the several ways so alleged by which the offense may

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be committed. We can conceive how procuring a female person to come into this State for the purpose of prostitution might constitute a distinct and separate transaction from causing her to enter a house of prostitution or to remain therein. Nevertheless they might be so connected as to constitute but different phases of one transaction. Together or separately they constitute but one cause of action, are embraced in the same general definition, and are made punishable in the same manner. There being nothing on the face of the information to indicate that the several acts were committed at different times or were distinct and separate offenses, we do not think the information was bad for duplicity. (*Blemer v. People*, 76 Ill. 265; *State v. Matthews*, 42 Vt. 542; *Cornell v. State*, 104 Wis. 527; *United States v. Fero*, 18 Fed. 901; *State v. Brady*, 16 R. I. 51; *Nicholas v. State*, 23 Tex. App. 317; 22 Cyc. 376.)

But while from the information there does not appear to have been two distinct offenses, the evidence indicated the contrary. It tended to show that the matters pertaining to her entry into a house of prostitution took place in the latter part of 1914. That relating to the charge of procuring the prosecuting witness to come into this State was to the effect that defendant sent for her in 1912 to come from Tennessee into this State. This testimony was erroneously admitted over defendant's objection to its competency, as the time was not within the period of the statute of limitations, the information having been filed in April, 1915. The testimony on that subject had no relation to the charge actually relied on, that of causing a female person to enter a house of prostitution, and in view of the conflicting testimony on the latter charge was calculated to prejudice defendant with the jury. For aught that can be told the jury may have found defendant guilty of procuring the prosecuting witness to come into this State in 1912 for the pur-

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pose of prostitution. We think it was reversible error to admit the evidence. Hence the judgment will be reversed and the cause remanded.

Reversed and remanded.

The People of the State of Illinois, Defendant in Error, v. Thomas Lyons, Plaintiff in Error.

Gen. No. 21,624. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed March 28, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois against Thomas Lyons, defendant, for larceny of a five dollar treasury note of the United States. From a judgment against him, defendant brings error.

Defendant was charged on information with larceny of "one United States of America Treasury Note of the denomination of five dollars of the value of five dollars." On trial before a jury he was found guilty as charged in the information, on the evidence of the prosecuting witness that the property taken from him was "a five dollar bill," without further evidence specifying its kind or character, or even whether the bill of that denomination was money of the United States or some other country.

LOUIS GREENBERG and THOMAS H. MERCER, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

Babcock v. Regelin, 198 Ill. App. 432.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

LARCENY, § 35*—*when evidence insufficient to sustain charge of larceny of U. S. treasury note.* Evidence of prosecuting witness that defendant took "a five dollar bill" from him does not support charge in the information of larceny of "one United States of America Treasury Note of the denomination of five dollars of the value of five dollars"; but there is a failure to prove an essential averment of the declaration.

Duane J. Babcock et al., Appellees, v. William C. Regelin et al., Appellants.

Gen. No. 20,890. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. A. D. WEBB, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed March 28, 1916.

Statement of the Case.

Action on the common counts by Duane J. Babcock and Grace Babcock, his wife, plaintiffs, against William C. Regelin and William Jensen, defendants. From a judgment for \$426.50 in favor of plaintiffs, defendants appeal.

T. F. MONAHAN, for appellants.

A. G. DICUS, for appellees.

MR. JUSTICE McGOORTY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. **PRINCIPAL AND AGENT, § 9***—*when principal bound by acts of agent.* By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent.

2. **PRINCIPAL AND AGENT, § 8***—*when evidence sufficient to establish agency to collect note and mortgage.* In an action to recover the proceeds of a note and mortgage alleged to have been collected by defendants' agent, evidence held sufficient to sustain a finding that plaintiffs were justified in presuming that defendants' salesman was authorized to act as agent of defendants in collecting the proceeds of the note and mortgage.

3. **PRINCIPAL AND AGENT, § 246***—*when existence of agency question for jury.* In an action in assumpsit where defendants' salesman assumed to act as agent of defendants in the matter of collecting the proceeds of a note and mortgage, and one of defendants paid over such proceeds to such salesman, held that it was a question for the jury to determine whether such defendant knew that such proceeds belonged to plaintiffs.

4. **PRINCIPAL AND AGENT, § 223***—*when plaintiff relieved of burden of proving joint liability of principal and agent.* Where no affidavit is filed in an action of assumpsit denying the joint liability of a principal and an agent for the proceeds of a note and mortgage collected by the agent and no evidence is produced disproving same, under Hurd's Rev. St., ch. 110, sec. 54 (J. & A. ¶ 8591), plaintiffs are relieved from the burden of proving joint liability in the first instance.

5. **APPEAL AND ERROR, § 1468***—*when admission of irrelevant evidence as to authority of agent harmless error.* In an action to recover the proceeds of a note and mortgage given as part of the purchase price of land in which the question involved was the authority of a salesman of defendants to act for defendants in collecting such note and mortgage, held that the admission of letters signed by defendants' salesman and written more than a year prior to the time when the note and mortgage was given by plaintiffs to defendants' salesman for collection, and which merely related to the sale of the farm, was not prejudicial error.

6. **PRINCIPAL AND AGENT, § 8***—*when evidence sufficient to show collection of note and mortgage by agent.* In an action to recover the proceeds of a note and mortgage alleged to have been collected by defendants' agent, evidence held sufficient to establish that the note and mortgage were given to defendants' agent and that he

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Zinz, 198 Ill. App. 434.

collected the proceeds thereon, it appearing that such agent admitted that he had received such note and mortgage and that he had sent them to two different banks for collection.

**The People of the State of Illinois ex rel. Tillie Wolf,
Defendant in Error, v. John Zinz, Plaintiff in
Error.**

Gen. No. 21,449. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed March 28, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois on the relation of Tillie Wolf against John Zinz, defendant, for bastardy. From a verdict finding defendant the father of the child of relatrix and judgment thereon, defendant brings error.

The child was born on December 23, 1914. The relatrix testified that she became pregnant during April, 1914; that she had sexual intercourse with defendant on the first Sunday of that month, and about four weeks prior thereto. Defendant testified that for a period of time prior to September 26, 1912, he sustained illicit relations with the relatrix, but did not see her thereafter until May 6, 1914, when he again had sexual intercourse with her. There was evidence tending to corroborate the testimony of relatrix.

SALTIEL & ROSSEN, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. **BASTARDS, § 22***—*when evidence sufficient to establish case.* A prosecution for bastardy is not a criminal proceeding, and it is only necessary to establish such case by a preponderance of the evidence.

2. **BASTARDS, § 22***—*when evidence sufficient to sustain verdict as to parentage of child.* On a prosecution for bastardy, evidence held sufficient to sustain the verdict finding defendant father of child of relatrix.

3. **NEW TRIAL, § 79***—*when motion for new trial on ground of newly-discovered evidence properly overruled.* Where evidence was known to defendant before the trial and no explanation given by him to explain his failure to offer such evidence during the trial, it is not error to overrule a motion for a new trial on the ground of newly-discovered evidence.

The People of the State of Illinois ex rel. Annie Jorczik, Defendant in Error, v. George Garines, Plaintiff in Error.

Gen. No. 21,596. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed March 28, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois on the relation of Annie Jorczik against George Garines, defendant, for bastardy. From a judgment on verdict finding him the father of the bastard child of relatrix, defendant brings error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Garines, 198 Ill. App. 435.

The relatrix testified on direct examination that she had coition with defendant, on several occasions, commencing June 11, 1914, while employed in a Chinese restaurant conducted by a certain Moy Sing. The defendant was employed as a cook in another restaurant on the first floor of the same building in which Moy Sing's restaurant was situated, and continued in such employment during the remainder of that year.

Defendant testified that he first saw complainant the last of July, 1914, and commencing August 2, 1914, that he accompanied her on three occasions to various places of amusement. Defendant denied that he, at any time, had illicit relations with relatrix. Moy Sing testified that he did not pay any attention as to whether the relatrix entered his employ in June or July, 1914, but, according to his best recollection, it was during the first two weeks of July. Two of defendant's witnesses, coemployees, one of whom commenced work there June 24, 1914, the other July 23, 1914, testified that they first saw complainant during the last days of July, 1914. Doctor Leonard S. Wood testified that he attended the relatrix during her accouchment, and that the child at birth was a normal child, weighing seven and one-half pounds, who took nourishment and commenced gaining weight from the time of its birth. The doctor further testified that the usual period of gestation is 280 days. There was no evidence offered tending to prove that the birth was premature.

THOMAS E. SWANSON, for plaintiff in error.

MACLAY HOYNE, for defendant in error; IRWIN N. WALKER, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. **BASTARDS, § 22***—*when evidence insufficient to establish parentage of alleged father.* In a prosecution for bastardy where the case of relatrix rested entirely upon her unsupported evidence, held that the evidence preponderated in favor of defendant, it appearing that the first act of intercourse with defendant according to relatrix's testimony, was 233 days before the birth of the child.

2. **BASTARDS, § 20***—*when burden of proof upon mother to show that child prematurely born.* In a bastardy prosecution where the testimony of relatrix shows that the first act of intercourse with defendant was 233 days before the birth of the child, the burden is upon her to establish by a preponderance of the evidence that the child was of premature birth.

The People of the State of Illinois ex rel. Tillie Schultz, Defendant in Error, v. Theodore Wunsch, Plaintiff in Error.

Gen. No. 21,781.

1. **ARREST, § 5***—*when presumed that officer arrested defendant within his jurisdiction.* It will be presumed that the police officer executing a warrant for the arrest of defendant in a bastardy prosecution in the Chicago Municipal Court acted strictly within the scope of his authority and within his jurisdiction, and that the defendant was found within the City of Chicago when arrested, as provided in Hurd's Rev. St., ch. 37, sec. 50a (J. & A. ¶ 3364).

2. **BASTARDS, § 12***—*when Municipal Court of Chicago jurisdiction of prosecution by nonresident female against nonresident male.* The burden of the support of a bastard child should be borne by the putative father and not by the public, and on that ground a nonresident female may prosecute him in the Municipal Court of Chicago, within the jurisdiction of which he was presumably arrested, even though he is also a nonresident and the child was born in New Mexico.

3. **BASTARDS, § 4***—*what is nature of action.* A bastardy proceeding is criminal in form, although the proceeding is in effect civil.

4. **INFANTS, § 36***—*when guardian ad litem should not be appointed.* A guardian ad litem should not be appointed for a minor

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Wunsch, 198 Ill. App. 437.

defendant in a bastardy proceeding, as such proceeding is criminal in form.

Error to the Municipal Court of Chicago; the Hon. JOSEPH SARATH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed March 28, 1916.

CANTWELL & SMITH, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Theodore Wunsch, defendant (plaintiff in error), was found by the court, trial by jury having been waived, to be the father of the bastard child of which the relatrix, an unmarried woman, was delivered on September 10, 1913, and judgment entered on the finding.

Defendant seeks to reverse the judgment because the relatrix and the defendant were nonresidents of Illinois. Relatrix testified that she became impregnated at Cedar Rapids, Iowa, as the result of coition with defendant, in December 1912, and that the child was born in New Mexico, September 10, 1913.

This prosecution was commenced in the Municipal Court under chapter 37, sec. 50a, page 743, Hurd's Rev. St. 1913 (J. & A. ¶ 3364), which is in part as follows:

“Whenever an unmarried woman, who shall be pregnant or delivered of a child, which by law would be deemed a bastard, shall file in the Municipal Court, if she be pregnant, or so delivered in the city of Chicago *or the person accused be found in said city of Chicago*, her complaint in writing under oath or affirmation accusing a person of being the father of such child, the court shall order a warrant to issue against the person so accused and cause him to be brought forthwith before the court.”

The bastardy warrant issued by the Municipal Court of Chicago showed this return:

“Executed this writ by arresting the within named Theodore Wunsch, and bringing his body into court this 9th day of August, A. D. 1915.

THOS. H. WARD,

Police officer and ex officio Bailiff.”

This court will presume that the officer executing this warrant acted strictly within the scope of his authority and within his jurisdiction, and that the defendant was found within the City of Chicago when arrested. *People v. Michael*, 189 Ill. App. 495, 500.

In the instant case the child was begotten and delivered outside of the State of Illinois and both of the parties were nonresidents at the time of the prosecution in question. The statute contains no express limitation of the kind insisted upon. This statute was enacted in the interest of the public, having, however, as its main purpose, to compel the father of a bastard child to bear part of the burden of its support. A nonresident female may prosecute the putative father in the courts of this State. *Kolbe v. People*, 85 Ill. 336; *Mings v. People*, 111 Ill. 98. The fact that the child was born in New Mexico does not exempt the defendant from liability, as the burden of its support should be borne by the putative father and not by the public.

It is also urged that the judgment should be reversed because no guardian *ad litem* was appointed by the court. In such a case as this, the public has such an interest in the prosecution and the support of the child as to declare or treat the offense as a misdemeanor, and thus enforce the judgment by imprisonment until the order is complied with precisely as in cases of fines recovered for misdemeanors, or similar offenses against the public. *Holcomb v. People*, 79 Ill. 409, 416. This is a statutory proceeding. There is nothing in the statute or common law, in conformity with which criminal trials are had in this State,

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requiring a different procedure when the defendant is a minor from that in other cases. Courts will always be careful to protect the substantial rights of infants in criminal as well as civil cases, but guardians *ad litem* are not appointed for such defendants in criminal cases and the procedure is the same whether the defendants are infants or adults. *Cutter v. People*, 184 Ill. 395, 396. In the instant case, so far as the arrest and trial are concerned, the form is criminal, though the proceeding is in effect civil, and therefore it was neither necessary nor proper for the court to appoint a guardian *ad litem* for defendant. The defendant, who was nineteen years old at the time of the trial, did not deny that he was the father of the child.

The Municipal Court clearly had jurisdiction of the persons and the subject-matter, and no prejudicial error having been committed, the judgment of the Municipal Court will be affirmed.

Judgment affirmed.

**Ellen L. Norton, Defendant in Error, v. W. J. Peer,
Plaintiff in Error.**

Gen. No. 20,771. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed April 10, 1916.

Statement of the Case.

Action by Ellen L. Norton, plaintiff, against W. J. Peer, defendant, in forcible detainer to recover possession of a barn. From a judgment in favor of plaintiff. defendant brings error.

Plaintiff was the owner of a lot on which was a residence, No. 4352 Calumet avenue, and a barn. For

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some years she had occupied the entire premises as her home. In January, 1914, she made a written lease to defendant of premises described therein as "House known as 4352 Calumet Ave.," the term to commence May 1, 1914, and expire April 30, 1916. Several weeks before the term began, defendant obtained from plaintiff permission to take immediate possession of the barn, and plaintiff removed her electric car therefrom and delivered the barn keys to defendant, who thereafter occupied it with his motor car. It also appeared that at the request of plaintiff's agent the defendant paid an additional insurance premium which was required on account of the occupancy of the barn with a gasoline car. There were also provisions in the lease which indicated that all the buildings on the lot were included in the demised premises.

WILLIAM FRIEDMAN, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 34*—*when lease of designated house construed as including barn on premises.* In an action of forcible detainer by a landlord against a tenant to recover possession of a barn, evidence held sufficient to establish that it was the understanding between lessor and lessee that the premises demised should include the entire lot with all the buildings thereon, the court taking the character of the neighborhood into consideration, and it appearing that the premises were described in the lease as a house known as a certain street number, that defendant obtained permission from plaintiff to take immediate possession of the barn thereon several days before the term began, that plaintiff removed her electric car from it, that defendant occupied it with his gasoline car, and that defendant paid an additional insurance premium required on account of the presence of a gasoline car in the barn.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hendrickson v. Hendrickson, 198 Ill. App. 442.

Clara C. Hendrickson, Defendant in Error, v. Oscar R. Hendrickson, Plaintiff in Error.

Gen. No. 21,455. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916. Rehearing denied April 24, 1916.

Statement of the Case.

Action by Clara C. Hendrickson, plaintiff, against Oscar R. Hendrickson, defendant, on a judgment note signed by defendant. From a judgment for \$334.08 on such note in favor of plaintiff, defendant brings error.

The making of the note by defendant, who was plaintiff's husband, and the delivery to her was not denied. Defendant contended that plaintiff was in ill health, and upon her saying "that she wanted something to protect her for her funeral expenses," he gave the note to her "to pacify her." On the other hand, plaintiff testified that the consideration for the note was money which she had loaned to the defendant. Her testimony was that she received no allowance from her husband for personal expenses, and during their married life she had worked for a time in a laundry, had kept roomers, that she had received from a daughter payment for board and washing, and that she kept an account of her own moneys in the State Bank of Chicago; that it was from her own money thus accumulated that she made the advances to her husband, who borrowed the money for the purpose of buying a lot. It also appeared that when she was married she had something over \$200 of her own. The husband, testifying, did not deny that he received this money from his wife, and the evidence showed that the amount of

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the note represented only a portion of the advances made by plaintiff to defendant.

ALBERT H. FRY, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 207*—*when evidence sufficient as basis for action by wife against husband on judgment note.* In an action on judgment note by a wife against her husband alleged to have been given for advances, *held* under all the evidence that plaintiff was entitled to maintain her action.

2. HUSBAND AND WIFE, § 207*—*when wife may sue husband on contract.* Under Hurd's Rev. St., ch. 68, secs. 1, 8 (J. & A. ¶¶ 6138, 6145), in force July 1, 1874, a husband or wife may sue the other on all contracts except for services rendered to each other.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McDermott v. Hoops, 198 Ill. App. 444.

**Lila McDermott et al., Heirs, Defendants in Error, v.
Donald K. Hoops, Plaintiff in Error.**

Gen. No. 21,552. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916. Rehearing denied April 24, 1916.

Statement of the Case.

Action by Lila McDermott *et al.*, heirs at law of Hannah M. Conroy, deceased, against Donald K. Hoops, defendant, for rent of premises under a written lease between deceased and defendant. From a judgment for two hundred dollars in favor of plaintiffs, defendant brings error.

THOMPSON & HUBBARD, for plaintiff in error.

H. P. TUCHSCHERER, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 124*—*when heirs of deceased lessor may bring action for rent.* After the decease of lessor his real estate passes to her heirs and thereafter they are entitled to bring suit for the rent, and suit need not be brought by the administrator.

2. WITNESSES, § 1127*—*when party may not testify as to transactions with deceased person against heirs.* In an action for rent by the heirs of deceased lessor, where it is conceded by plaintiffs that if defendant were present he would testify to the poor condition of the heating apparatus in the house and to other matters set out in his affidavit of defense, under the statute on evidence and depositions, Hurd's Rev. St., ch. 51, sec. 2 (J. & A. ¶ 5519), *held* that he would not be permitted to testify to such facts occurring before the death of lessor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anton Klaus et al., Defendants in Error, v. J. H. Flick Construction Company, Plaintiff in Error.

Gen. No. 21,572.

1. **FRAUD, § 115***—*when evidence sufficient to show fraud in procuring contract.* In an action for wages by laborers, held under the evidence that contract interposed as a defense was procured by fraud, it appearing that plaintiffs had been in this country only a short time, were ignorant of English, and that they had signed a contract which made them subcontractors, and which they thought was a receipt for rubber boots.

2. **MASTER AND SERVANT, § 65***—*when servant may recover value of services.* Where a contract of employment is invalid because it was obtained by fraud, the servant is entitled to recover the reasonable value of his labor.

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916. Rehearing denied April 24, 1916.

EDDY, WETTEN & PEGLER, for plaintiff in error; JASPER F. ROMMEL, of counsel.

CHARLES P. SCHWARTZ and H. J. FRIEDMAN, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiffs, eight in number, brought suit for the value of their services as laborers while employed by defendant. Upon trial the jury returned a verdict against defendant for \$325, upon which judgment was entered. Defendant seeks to have this judgment reversed. No briefs have been filed or arguments made in this court on behalf of plaintiffs.

The defendant is engaged in general railroad con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Klaus v. J. H. Flick Construction Co., 198 Ill. App. 445.

tracting. At the time in question it was engaged in grading the right of way of the Chicago, Milwaukee & St. Paul Railway Company in Wisconsin. Through an employment agency in Chicago plaintiffs were sent to the place of this work. Before commencing work these laborers were asked to sign a contract, which apparently was signed by each of them. This contract is now interposed as a defense. We have inspected the original contract as it appears in the record. It fills a page of legal cap and is typewritten in half space. There are also interlineations and insertions made with pen and ink in various places. It has been difficult for this court to understand parts of it, or even to read all of some of its provisions. In its general scheme it seems to be an attempt to fix upon each laborer the character of a subcontractor, with conditions that he should receive no pay for his work until the engineer of the Railway Company should in writing approve the work of all the so-called subcontractors. It also contemplates that from the laborers' pay should be deducted rent of cars, track and tools, and these must be returned in as good condition as when furnished, and if not the laborers were to be charged for their full value. There is also a provision written with pen and ink which is not wholly legible, but it seems to obligate the laborers to assume the cost of constructing a camp and open roads, and other work done before they arrived at this place.

These laborers were born in foreign countries, most if not all in Bohemia. They had been in this country only a short time, and worked as hand laborers at track work. They were ignorant of English. Some of them testified that when the contract was presented they were told that it was a receipt for rubber boots which were given them. None of them understood what in fact they were signing.

From these facts, with other circumstances, the jury were at liberty to conclude that the signing of the

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contract was procured by fraud. From the verdict it is evident that the jury were of that opinion, and with this conclusion this court without hesitation is in accord. The mere statement of the facts impels to this conclusion. The contract, procured by fraud in fact, is invalid, and therefore falls from the case.

Objections are made to the rulings of the court upon the introduction of testimony and to the instructions to the jury, but errors in this respect, if any, are not of sufficient importance to require a reversal. Other points urged by counsel for defendant do not persuade us.

Plaintiffs were entitled to recover the reasonable value of their labor. The evidence justifies the amount returned by the verdict. The judgment is right and is affirmed.

Affirmed.

William F. Schuman, Plaintiff in Error, v. Chicago Railways Company, Defendant in Error.

Gen. No. 21,652. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by William F. Schuman, plaintiff, against Chicago Railways Company, defendant, on account of injuries sustained by him through the sudden starting of one of defendant's cars when he was alighting, whereby he was injured. From a judgment in favor of defendant, plaintiff brings error.

Schuman v. Chicago Railways Company, 198 Ill. App. 447.

G. M. PETERS, for plaintiff in error.

CHARLES L. MAHONY and FRANK L. KRIETE, for defendant in error; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to sustain finding that street railroad not guilty of negligence in suddenly starting car.* In an action by a street car passenger for damages for personal injuries alleged to be due to the starting of one of defendant's cars while plaintiff was attempting to alight therefrom, evidence held sufficient to sustain a finding that defendant was not guilty of negligence, there being abundant evidence that the car made only one stop for plaintiff to alight and remained standing until some time after the accident occurred.

2. APPEAL AND ERROR, § 1241*—*when party may not complain that instruction inapplicable to issues.* A party to an action cannot complain that an instruction on contributory negligence, given at the request of the adverse party, is inapplicable to the issues on the ground that there is no negligence in the case, where the court gave another instruction on such subject at his request.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kleinschrodt v. John Hancock Mut. Life Ins. Co., 198 Ill. App. 449.

Anna Kleinschrodt, Defendant in Error, v. John Hancock Mutual Life Insurance Company, Plaintiff in Error.

Gen. No. 21,700.

INSURANCE, — *when provision of policy limiting the amount of total insurance recoverable on life of child valid.* A provision in a life insurance policy limiting the right of recovery on all policies on the life of a child to a specified sum, presumably only enough to adequately cover expenses of the last illness and burial, held valid so as to prevent recovery on such a policy where the beneficiaries had already recovered on other policies a sum equal to the amount limited by the policy.

Error to the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and judgment here. Opinion filed April 10, 1916.

CHARLES H. BURRAS, for plaintiff in error.

LITZINGER, MCGURN & REID, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff was the beneficiary named in a policy for \$125 issued by the defendant upon the life of Violet English, a child fifteen years of age. Plaintiff was no kin of the insured. Upon trial the court gave plaintiff judgment for \$125.

This judgment cannot stand. The policy was issued May 8, 1912, and the insured died the following year. The policy contained a specific provision that the total amount of insurance on the life of the insured, issued upon the application of any other person than the insured, including this policy, and in all other companies and societies, should not under any circumstances exceed \$520. In the "table of ages" the limit

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kleinschrodt v. John Hancock Mut. Life Ins. Co., 198 Ill. App. 449.

of insurance was placed at \$520; and continuing said policy of insurance further provides:

“If other policies of insurance in this or other companies and societies are in force at the time of death, the amount payable under this policy shall not be greater than the excess of the amount specified in above table, under age at death, over the total amount payable under all other policies by whomsoever issued.

“Should the amount otherwise payable hereunder be reduced through operation of the preceding clause, the Company will refund a proportionate part of the premiums paid hereunder, and if for the same reason, there should be no amount payable hereunder the Company will refund the full amount of premiums paid.”

It was shown by the evidence that on October 16, 1911, the Prudential Insurance Company of America issued its policy of insurance on the life of said Violet English in the sum of \$375, in which Anna Kleinschrodt, plaintiff herein, was named beneficiary, and that after the death of said insured the amount of this policy, namely \$375, was paid to Anna Kleinschrodt, and that she is the same person who is claiming under the policy in the present case.

It was also shown that on December 13, 1911, this same defendant company, John Hancock Mutual Life Insurance Company, issued another policy on the life of Violet English for the sum of \$336, and that said Anna Kleinschrodt was the beneficiary in said policy, although the beneficiary in that policy was subsequently changed to Helena Starr; that the John Hancock Mutual Life Insurance Company paid to Helena Starr upon its prior policy the sum of \$145, so that there has been paid upon these two policies the total sum of \$520, which is the limit of insurance permitted to be carried upon the insured's life. Under the provisions of the instant policy no more insurance can be collected.

No good reason appears for not enforcing this provision to limit the amount of insurance; rather reason

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and judgment support a policy that tends to curb excessive insurance on the life of children. We discern no reason for such insurance to an amount more than is necessary for expenses during the last illness and for burial.

For the reasons above indicated we are of the opinion that there can be no recovery, and the judgment is reversed and judgment of *nil capiat* will be entered in this court.

Judgment reversed and judgment here.

The People of the State of Illinois ex rel. Harry H. Hammerschleg, Defendant in Error, v. City of Chicago et al., Plaintiffs in Error.

Gen. No. 21,795. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1916. Reversed and remanded with directions. Opinion filed April 10, 1916.

Statement of the Case.

Petition for mandamus by the People of the State of Illinois on the relation of Harry H. Hammerschleg against the City of Chicago *et al.*, respondents. From a judgment in favor of relator, defendants bring error.

Petitioner filed his amended petition for a writ of mandamus to compel the City of Chicago, the civil service commissioners, the fire marshal and the city comptroller to place his name on the roster of the fire department and upon the fire department pay roll of the City of Chicago as a pipeman, with the right to

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enter upon his duties as pipeman and receive the salary therefor as he had prior to his removal from the service on or about July 25, 1908. To this amended petition a general demurrer was filed and overruled. Respondents elected to stand by the demurrer, and judgment was rendered that a writ of mandamus issue.

SAMUEL A. ETTelson, for plaintiffs in error; Roy S. GASKILL, of counsel.

FULTON, GAREY & DEUTSCHMAN, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MANDAMUS, § 1*—*when will not lie.* Mandamus will not issue unless the party applying for it shows a right which is clear and undeniable.

2. CIVIL SERVICE, § 27*—*when petition in mandamus to compel reinstatement of pipeman in fire department insufficient.* A petition for mandamus for the reinstatement of petitioner in the office of pipeman in the fire department of the City of Chicago, which alleges the passage of a city ordinance creating such fire department and describes such ordinance in the petition as providing that the fire department shall include "such numbers of * * * pipemen * * * and employees as the city council may by ordinance provide," is insufficient as such ordinance contemplates a further ordinance by the city establishing the number of pipemen in the fire department, and such latter ordinance should be pleaded.

3. CIVIL SERVICE, — *what does not constitute establishment of an office.* The fact that the civil service commission establishes a classification of offices and places of employment does not establish the office itself.

4. CIVIL SERVICE, § 27*—*when petition of mandamus to compel reinstatement of pipeman in fire department insufficient.* Where petitioner for mandamus for reinstatement to the office of pipeman in the Chicago fire department alleged his discharge by the chief of such department but failed to allege in what manner the chief did not comply with provisions of the civil service act and civil service

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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rules, providing that original appointments shall be on probation for a period of six months, and that if any probationer, upon fair test, shall be found incompetent or unqualified to perform the duties of the position, the appointing officer shall so certify to the commission, and the head of the department may, with the consent of the commission, discharge him upon assigning in writing his reasons, *held* that the petition was insufficient.

Matensz Ozech, Appellee, v. International Harvester Company of New Jersey, Appellant.

Gen. No. 21,822. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916. Rehearing denied April 24, 1916.

Statement of the Case.

Action by Matensz Ozech, plaintiff, against International Harvester Company of New Jersey, defendant, for damages caused by injuries sustained through an explosion in a small foundry connected with defendant's plant. From a verdict and judgment for \$1,250 in favor of plaintiff, defendant appeals.

The cupola or furnace in the foundry was cylindrical in shape, four feet in diameter, resting on four legs which were about five feet high, standing on a concrete foundation. The upper part of the cupola extended through the roof. The bottom consisted of two semicircular steel doors which when closed were kept to place by two steel props; when closed the contents of the cupola were retained; when open the contents dropped out. The cupola was loaded with alternate layers of iron and coke from a second floor, which was called the charging platform, occasionally

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the iron in the cupola did not melt to the proper consistency. When this happened it was necessary to open the bottom doors and allow the mass to drop out; otherwise it would grow cold and solidify, and then could not be removed without destroying the cupola.

Upon this occasion the iron was not sufficiently molten, and the foreman concluded to empty the cupola. As the operation is attended with danger, he first ordered the laborers, including plaintiff, who was on the charging platform, to leave the building, and then directed a man, called the cupola tender, to open the bottom doors. This man, with a long rod, knocked out the props, the doors swung open, and the mass of iron in varying stages of liquefaction, with coke in various stages of combustion, dropped upon the foundation under the cupola. What is described as "a terrific explosion" ensued. Parts of the brick walls of the foundry were demolished and the building practically wrecked. Three men were killed. Plaintiff stated that upon receiving orders to leave the building he went from the charging platform by an elevator and had reached the ground floor and "was hardly able to take a step" when the explosion occurred. He was blown through the doors and underneath a freight car standing about fifteen feet from the building. Some witnesses placed plaintiff just outside the building at the instant of the explosion.

Plaintiff alleged and introduced evidence tending to prove that the hot contents of the cupola fell into water or on a damp place present around the legs of the cupola, and witnesses testified that this contact of molten iron with water not in sufficient quantity to cover it would cause an explosion. Defendant ascribed the explosion to a rush of gas into a "pocket" formed by a partition and the floor of the charging platform, and the ignition of this gas by the hot metal and the flaming coke. Defendant argued that its explanation was established by the greater weight of the evidence,

and therefore plaintiff's allegations as laid in his declaration had failed of proof, and hence he could not recover.

The following instructions requested by defendant were refused:

"You are further instructed by the court that if you believe from the evidence that the explosion in question was caused by gases formed within the furnace and liberated and ignited at the time the molten metal was dumped upon the ground, and not by reason of the molten metal coming in contact with the water in question, then the plaintiff cannot recover, for the reason that the plaintiff does not claim in his declaration the explosion to have been due to any other cause than the contact of the molten metal with the water. Before the plaintiff can recover he must prove the explosion to have occurred in the manner and for the reasons stated in his declaration and not in any other manner whatever."

"You are instructed by the court that before the plaintiff can recover in this case he must prove by a preponderance or greater weight of the evidence that he actually sustained the injuries and disabilities which he has claimed to have sustained, and that such injuries were the direct and proximate result of an explosion caused by the molten metal from the furnace coming in contact with water alleged to have been on the ground under the furnace; and if you believe from the evidence that the accident or explosion was due to any other cause than said molten metal coming in contact with said water then the plaintiff cannot recover and your verdict must be for the defendant."

"You are instructed by the court that before the plaintiff can recover in this case he must prove by a preponderance or greater weight of the evidence that he actually sustained the injuries and disabilities which he has claimed to have sustained, and that such injuries were the direct and proximate result of an explosion caused by the molten metal from the furnace coming in contact with water alleged to have been on the ground under the furnace; and if you believe from the evidence that the accident or explosion was due

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to any other cause than said molten metal coming in contact with said water then the plaintiff cannot recover and your verdict must be for the defendant."

DAVID A. OREBAUGH, for appellant; EDGAR A. BANCROFT, of counsel.

S. P. DOUTHART and FRED C. SMITH, for appellee; LOUIS H. GEIMAN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 702*—*when evidence sufficient to sustain finding in favor of servant as to cause of explosion in foundry.* Where plaintiff in an action for damages for personal injuries claims that an explosion whereby he was injured in defendant's foundry was caused by the fall of molten metal and coke in combustion from a cupola into water or a damp place under such cupola and defendant claimed that such explosion was not so caused but ascribed it to a rush of gas into a pocket formed by the floor of a charging platform and a partition and the ignition of such gas by the hot metal and flaming coke, and it appeared that there was conflicting testimony as to the quantity and exact location of water on the ground around or under the cupola, and variant views of witnesses concerning the respective causal theories of the explosion, evidence *held* sufficient to sustain a finding that plaintiff had proved his claim as to the cause of explosion.

2. MASTER AND SERVANT, § 831*—*when party bound by finding of jury on requested interrogatory.* Where plaintiff alleged and introduced evidence to the effect that the injuries sustained by him in defendant's foundry were caused by an explosion resulting from the dumping of a cupola containing molten metal and burning coke into water, and where on defendant's request a special interrogatory was given to the jury whereby they were asked whether the explosion was so caused, to which the jury answered yes, defendant was conclusively bound by this finding, he having made no motion to set it aside, and there being no assignment of error in that regard.

3. DAMAGES, § 188*—*when evidence sufficient to establish personal injuries to servant in foundry.* In an action for damages for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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personal injuries to an employee in a foundry, evidence *held* sufficient to establish that plaintiff had suffered personal injuries, there being evidence that the explosion was of sufficient force to wreck the building, and medical testimony that plaintiff was suffering from a dilation of the heart and an injury to the kidneys.

4. DAMAGES, § 115*—*when verdict for damages for personal injuries not excessive.* Injuries sustained by a workman in a foundry explosion resulting from dumping of hot contents of a cupola into water, *held* to justify a verdict for \$1,250, it appearing that considerable shock must have resulted inasmuch as he was only a few feet away from an explosion sufficiently violent to wreck a brick building, that there is testimony of physicians as to the presence of dilation of the heart and injury to the kidneys, even though plaintiff may have affected to be in more physical distress than is warranted by the facts.

5. MASTER AND SERVANT, § 833*—*when refusal of instructions harmless error.* The refusal to give instructions requested by defendant in an action by a foundry employee for injuries due to an explosion from molten metal striking water when dumped upon the ground, that the jury must find defendant not guilty if they found that molten metal fell into the water and irrespective of the negligent order which caused the cupola of metal to be dumped before plaintiff had time to get out of the building, *held* harmless error where the jury in answering special interrogatories asked by defendant found that the molten metal fell into the water and caused the explosion.

6. APPEAL AND ERROR, § 1035*—*when improper argument or conduct of counsel not considered on review.* Alleged improper argument or conduct of counsel will not be considered in the court of review where defendant does not assign error on such ground.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kane v. Indiana Harbor Belt R. Co., 198 Ill. App. 458.

John P. Kane, Appellee, v. Indiana Harbor Belt Railroad Company, Appellant.

Gen. No. 21,869. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by John P. Kane, Plaintiff, against Indiana Harbor Belt Railroad Company, defendant, on account of injuries sustained by plaintiff in a fall from a high platform which he alleged was caused by negligence of defendant in leaving crushed or slush ice on the platform, causing him to slip and fall. From a verdict and judgment for plaintiff, defendant appeals.

The platform was about 760 feet long and 16 feet wide. It was a "double-decker" with a sheet-iron or tin roof. The upper deck was about 21 feet from the ground. At each end was a cluster of lights, and under instructions these were lighted only when icing cars. Railroad tracks ran parallel to this platform on both sides. Crushed ice was prepared in the ice house, then brought over the platform to the cars and from the upper deck it was placed in cars carrying beef and poultry. One crew under a foreman did the work in daytime, and another crew at nighttime. Orders were given to each crew when the work was finished to clean up all spilled or loose ice. Instructions from the foreman were that whenever there was any slush ice or solid ice spilled on the platform it must be immediately picked up, placed in a full car that might be standing along there; that if there was no full car standing there to throw it into one empty; that if there was no empty car there to shovel it off on the ground, and not to allow it to lay on the plat-

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form. In February, 1912, when the accident occurred, plaintiff did clerical work around the ice house, assisted the watchman and assisted the night crew in icing cars. Upon the night of the accident no cars were iced. Plaintiff was assisting the watchman, and in the performance of this duty he walked over the top platform at least three times during the night to pull the night watchman's clock and at these times he walked along the south side of the platform. On the next trip, which was his last, he walked along the north side, and stepped into slush or crushed ice which had been left there by the day crew. He did not know it was there and on account of the darkness did not see it. It caused him to slip and he fell off the platform down to the railroad track, receiving severe injuries. Only once during the seven years he had worked there had he observed any slush ice left on the platform by the other crew; the instructions to remove this ice had been followed with only one exception for many years.

GLENNON, CARY, WALKER & HOWE, for appellant;
SIDNEY C. MURRAY, of counsel.

STEDMAN & SOELKE, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 682*—*when evidence sufficient to sustain finding that servant was employed about an ice house and platform used in icing cars.* In an action against a railroad company for injuries received by an assistant watchman as a result of slipping on loose ice on a platform used in loading ice in refrigerator cars, *held* that the jury could reasonably believe that plaintiff was employed in and about an ice house and icing platform used for icing cars.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Summers v. Hedenberg, 198 Ill. App. 460.

2. **MASTER AND SERVANT, § 689***—*when evidence sufficient to sustain finding that presence of ice on platform used in icing cars unusual.* In an action against a railroad company by an assistant watchman who was injured while on a tour of inspection at night as a result of slipping on loose ice on a long and high unlighted platform used in icing refrigerator cars, evidence held sufficient to sustain a finding that the presence of ice on the platform was an unusual and extraordinary occurrence.

3. **MASTER AND SERVANT, § 333***—*when assistant railroad watchman does not assume risk of injury from ice on platform used in icing cars.* An assistant railroad watchman who is making a tour of inspection at night, and in the course of his duties, passes over a high, unlighted platform used in icing refrigerator cars, does not assume the risk incident to the presence of crushed ice at such time, it appearing that such presence of ice is unusual and extraordinary.

**Robert F. Summers, Appellee v. James W. Hedenberg,
Appellant.**

Gen. No. 22,011.

1. **VENDOR AND PURCHASER, § 65***—*when provision in contract for delivery of warranty deed modified.* A provision in a contract for the sale of real estate relative to a warranty deed being ready for delivery, held modified by another provision that it should be deposited with a title and trust company after the first two payments under the contract had been so deposited.

2. **APPEAL AND ERROR, § 367***—*when defense not raised in answer unavailable on appeal.* Where in proceedings in equity to declare void a contract for the sale of real estate, defendant contended for the first time in the Appellate Court that complainant did not make proof of ownership, and did not, in his answer deny the averment of ownership in the bill of complaint, held the defendant could not avail himself of such matter of defense.

3. **EQUITY, § 156***—*when defendant must set out nature of defense in answer.* The rule in chancery is that a defendant is bound to apprise the complainant by his answer of the nature of the defense he intends to set up, and the defendant cannot avail himself

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of any matter of defense which is not stated in his answer even though it should appear in the evidence.

4. EQUITY, § 431*—*when point not raised before master waived.* A point which is not raised before the master by objection or exception to his report is waived.

5. CONTRACTS, § 164*—*when parol evidence as to negotiations leading to land contract inadmissible.* Where a contract for the sale of lands is plain and unambiguous, evidence as to negotiations leading up to it, in equity proceedings to declare same forfeited, is inadmissible and such evidence is properly disregarded by the master.

6. VENDOR AND PURCHASER, § 151*—*when tender of deed excused by failure to comply with contract.* Defendant's repeated failures to comply with a contract whereby he had agreed to purchase real estate from complainant, held to amount to a refusal to so comply, which, under the terms of the contract, excused complainant from tendering a deed to defendant, it appearing that the terms of the contract obligated him to pay a specified sum within a certain period after a specified date, and such payment was repeatedly demanded for several months when complainant elected to declare the contract forfeited.

7. VENDOR AND PURCHASER, § 67*—*when provision in contract reciting payment as earnest money construed as referring to payment on purchase price.* Provision in contract for sale of real estate that "said purchaser has paid \$1,000 as earnest money to be applied on such purchase when consummated," construed to mean that the purchaser parted with the earnest money for the benefit of the seller and that he paid it as a part of the purchase money.

8. VENDOR AND PURCHASER, § 67*—*when vendor entitled to earnest money as liquidated damages.* Provisions in contract for the sale of real estate with reference to earnest money paid by the purchaser, construed to mean that in case of defects in title which are not cured, at purchaser's option the contract becomes void and the earnest money shall be returned, but if the purchaser fails to perform, then, at the seller's option, the earnest money should be retained by the vendor as liquidated damages, and this regardless of whether the earnest money was delivered to the seller or by agreement was held by a third party.

9. EQUITY, § 9*—*when equity will determine whether party rightfully declared penalty forfeited.* A court of equity will not interfere with contracts providing for penalties and forfeitures, if the parties proceed strictly according to their terms, except in cases of fraud, mistake or unconscionable provisions but where the aid of such court is sought to declare whether a party rightfully declared

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Summers v. Hedenberg, 198 Ill. App. 460.

a penalty forfeited, it is very different from asking the court itself to declare such forfeiture.

10. EQUITY, § 512*—*when decree does not declare a forfeiture.* In chancery proceedings where complainant seeks to have a contract for the sale of real estate from him to defendant declared void and other equitable relief, and where under such contract defendant paid earnest money to a title and trust company to be applied on his purchase when completed, and he tries to obtain it from the stakeholder and such money is complainant's own according to the terms of the contract, and, inasmuch as no contractual relations exist, defendant cannot sue such holder in assumpsit, and the court incidentally must decide whether the forfeiture which complainant has declared was justified under all the circumstances of the case, there is no declaration of a forfeiture but simply a finding that the declaration of forfeiture is warranted under the circumstances.

11. VENDOR AND PURCHASER, § 151*—*when tender of deed unnecessary.* Where complainant sought in a court of equity to have a contract, whereby he agreed to sell real estate to defendant, declared void, a tender of deed to defendant *held* not necessary, as by means of defendant's default it would have been a useless act, and as by the terms of the contract it was provided that there should be no delivery to defendant but simply a deposit with a title and trust company.

12. VENDOR AND PURCHASER, § 116*—*what constitutes tender of performance of contract for sale of real estate by vendor.* Where the obligations in a contract for the sale of real estate became mutual and concurrent by the service of a notice on the part of the vendor whereby he offered to perform, *held* such offer of performance was a tender of performance.

13. VENDOR AND PURCHASER, § 116*—*what constitutes tender of performance of contract for sale of real estate.* A tender of performance in the case of mutual and concurrent promises in a contract for the sale of real estate does not mean the same kind of an offer as when used in reference to the payment of a debt due in money, but only means a readiness and willingness accompanied by ability on the part of the parties.

14. VENDOR AND PURCHASER, § 277*—*when vendor may declare contract for sale of land forfeited.* Under the terms of contract for sale of real estate and under the circumstances shown by the evidence, complainant vendor *held* to have the right to declare such contract forfeited.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Summers v. Hedenberg, 198 Ill. App. 460.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

BRADLEY, HARPER & EHEIM, for appellant; THOMAS E. D. BRADLEY and EDWARD J. FARRELL, of counsel.

DAWSON & DAWSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This appeal brings in review a decree for complainant Summers on a bill filed by him against defendant Hedenberg, praying that a certain contract between the parties for the sale of real estate by complainant to defendant, made October 2, 1913, be declared void; that the affidavit of claim made and filed by defendant be removed as a cloud on complainant's title; that defendant be enjoined from setting up any right under the contract; that a declaration of forfeiture of the contract made by complainant be decreed valid, and that a deposit of \$1,000 earnest money made by defendant with the Chicago Title & Trust Company be forfeited and the depositary ordered to pay the same to complainant. The contract price was \$29,500, to be paid, \$1,000 as earnest money, \$4,000 within thirty days after the title had been examined and found good or accepted by the purchaser, and \$5,000 within sixty days after such examination and acceptance; and the remaining sum of \$19,500 by giving three notes in the sum of \$6,500 each, due in one, two, and three years after date, secured by trust deed upon the real estate. The contract further provides:

“This contract and the earnest money shall be held by the Chicago Title and Trust Co. in escrow, and when the payments of the respective sums of \$4,000 and \$5,000 shall have been deposited by purchaser with said Chicago Title and Trust Company in accordance with the terms of this contract, seller shall deposit

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with said company a good and sufficient warranty deed conveying said property to purchaser and purchaser shall deposit the notes and trust deed aforesaid, securing said balance of \$19,500 purchase money. Said deeds shall be recorded, the examination of title continued by the Chicago Title and Trust Company, and upon its report that purchaser has good title to said real estate, subject to said encumbrance of \$19,500, said sum of \$10,000 held by it and said notes and trust deed shall be delivered by it to seller, and said warranty deed to purchaser."

The contract also contains this provision:

"Provided a good and sufficient general warranty deed, conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid) shall be ready for delivery."

This provision is superseded by the provision for the deposits with the Chicago Title and Trust Company. The provision relating to the warranty deed being ready for delivery was modified by prescribing that it shall be deposited with the Trust Company after the first two payments shall have been deposited.

Defendant failed to make the payment of \$4,000 although such payment was demanded many times between December 1, 1913, and April 13, 1914, and repeated promises were made by defendant to pay the same within a few days. Complainant did not consent to any delay in the time of payment, and in March, 1914, notified defendant that unless he made the payments then due and carried out the other provisions of the contract by May 4, 1914, complainant would forfeit and cancel the contract and elect to retain the \$1,000 earnest money as liquidated damages. Nothing further was done by defendant and May 5, 1914, complainant notified defendant that he elected to declare the contract forfeited and to receive the \$1,000 deposited with the Trust Company as liquidated damages for defendant's failure to perform the contract in accordance with its terms.

May 29, 1914, defendant filed an affidavit claiming

that the time for the performance of the various provisions of the contract had by mutual agreement of the parties been extended from time to time; that complainant by notice sought to fix an arbitrary time for performance and to cancel the contract and retain the \$1,000, and defendant claimed that the contract was in full force. Complainant filed his bill August 19, 1914, setting up the contract, the notices, and appellant's affidavit, and asking for relief as before stated.

Appellant relies on four grounds of reversal:

That appellee did not make proof of ownership.

That he did not tender a deed nor prescribe the form of the trust deed to be given.

That the time fixed in the notice preliminary to forfeiture was not reasonable.

That equity will not lend its aid to enforce a forfeiture.

The answer of defendant does not deny the allegation of ownership made in the first paragraph of the bill of complaint, and it is only in this court that, for the first time, it is contended that appellee did not make formal proof of ownership.

The rule in chancery is that a defendant is bound to apprise the complainant by his answer of the nature of the defense he intends to set up, and that the defendant cannot avail himself of any matter of defense which is not stated in his answer even though it should appear in the evidence.

A point which is not raised before the master by objection or exception to his report is considered as waived.

The contract is plain and unambiguous, and evidence as to negotiations leading up to it were inadmissible and such evidence was properly disregarded by the master.

Defendant's repeated failures to comply with the contract between December 1913 and March 1914 amounted to a refusal to so comply, and this under the

terms of the contract excused the complainant from tendering a deed to defendant. The contract shows that the purchaser parted with the earnest money for the benefit of the seller; that is, he paid it as a part of the purchase money. "Said purchaser has paid \$1,000 as earnest money, to be applied on such purchase when consummated." It makes no difference whether the earnest money was delivered to the seller or by agreement is held by a third party. In case of defects in title which are not cured, at purchaser's option the contract becomes void and said earnest money should be returned. If the purchaser fails to perform, then at seller's option the earnest money should be retained by the vendor as liquidated damages.

By the terms of the contract the earnest money was Summers' money from the moment it was paid over as part of the purchase money, and so remained unless there was a defect in the title which was neither cured nor excused.

In *Howe v. Smith*, 27 Law Reports, Ch. D. 89, there was a contract of sale in which Howe agreed to purchase from Smith certain premises, "for the price of £12500, £500 part thereof having been paid on the signing of this agreement as a deposit and in part payment of the purchase money." The purchaser delayed closing the deal from time to time, and the court decided that the delays caused by the purchaser deprived him of the right to enforce specific performance. The complainant's attorney then asked for the return of the deposit and that the statement of claim might be amended so that that question might be raised and disposed of. This was granted by the court, and the substance of the opinions are on the point as to whether the purchaser had a right to the return of the earnest money.

One of the Justices, Lord Cotton, said:

"What is the deposit? The deposit, as I under-

stand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

Lord Justice Bowen said:

"A deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase. But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

Lord Justice Fry said:

"It appears to me that when the purchaser had failed on his part down to the last moment which law or equity gave him, the vendor's title was absolute, both to the whole legal and equitable estate in the land sold, and also, by force of the terms of the deposit, to the deposited money, and that the purchaser could recover no right in this deposit because the vendor chose to sell his land, as he was entitled to do under his title as absolute legal and equitable owner."

In *Catton v. Bennett*, 51 L. T. (N S.) 70, the contract provided:

"As an earnest hereof the purchaser has this day paid into the hands of Mervin, Richard Smith & Co. the sum of £500 as a deposit, the deposit to form part of the purchase money to be paid on the day of possession."

In discussing the term "earnest money" Judge Kay says:

"Looking to the authorities that have been cited on this subject, I should be strongly inclined to think

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that 'as earnest hereof' meant a sum which if I do not perform my part of the contract is a sum which the vendor is to keep.'"

In *Bucklen v. Hasterlik*, 155 Ill. 423, the court quotes with approval a sentence from *Depree v. Bedborough*, 4 Giff. 479, to this effect:

"Then how the person who was in default can, upon that default and in consequence of that default, acquire any right to the money, which was parted with as a security that there should be no default, it is difficult to conceive."

The courts have never attempted to say that parties cannot make contracts which provide for penalties and forfeitures, and if the parties so provide in their contracts and proceed strictly according to their terms, a court of equity will not interfere except in cases of fraud, mistake or unconscionable provisions. It makes a great difference whether in seeking relief in a court of equity the court is asked for some affirmative action which requires it to decree a forfeiture, or whether the aid of the court is sought for some relief in deciding whether to grant it or not. The court must pass on the question of whether the party seeking the aid of the court has rightfully sought to enforce the terms of a valid contract. In this case the defendant sought to obtain money from the stake holder—complainant's own money according to the terms of the contract. Defendant cannot sue the Chicago Title and Trust Company in assumpsit, as no contractual relations exist. The court incidentally must decide whether the forfeiture declared by complainant was justified under all the circumstances of the case. This is very different from asking the court itself to declare a forfeiture. In no part of the decree of the Circuit Court was there a declaration of forfeiture. It simply found that the declaration of forfeiture was warranted under the circumstances.

A tender was not necessary, first, because by reason of defendant's default it would have been a useless act;

second, because by the terms of the contract defendant provided that there was to be no delivery to him, but simply a deposit with the Chicago Title and Trust Company. But even on counsel's own theory that by the service of the notice the obligations of the contract became mutual and concurrent, there was a tender. The offer to perform made by appellee was a tender. The case of *Clark v. Weis*, 87 Ill. 438, points out that tender in the case of mutual and concurrent promises does not mean the same kind of an offer as when used in reference to the payment of a debt due in money, but only means a readiness and willingness accompanied with ability on the part of the parties. The court on page 440 says:

“The promises of the parties here were mutual and dependent, and, as a clear exposition of the law applicable, we quote from the opinion of Storrs, C. J., in *Smith v. Lewis*, 26 Conn. 110: ‘As the agreement required only that the acts of both the parties should be done at the same time, neither was obliged to do the first act, or consequently to perform his part of the agreement without or before the other. The plaintiff, in order to sustain this action, need only to show that he did what the law required of him; and all that it required was, that he should be ready and willing to perform on his part, if the defendant was ready to perform on his. Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word “tender” as used in such a connection does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, and the transaction is completed and ended; but it only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which

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he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability and notice are sufficient evidence of, and indeed imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreements we are now considering. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement.' ''

We think that under the terms of the contract and under the circumstances shown by the evidence, complainant had a right to declare the contract forfeited. If he had, all the relief prayed for follows as a matter of course, to wit, that the Chicago Title and Trust Company should pay over the \$1,000 deposit, and that the affidavit filed by Hedenberg be removed as a cloud.

Under the evidence in the case the decree was proper and is affirmed.

Affirmed.

John Lang and Louise Lang, Appellees, v. James W. Hedenberg, Appellant.

Gen. No. 22,012. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Suit by John Lang and Louise Lang, complainants, against James W. Hedenberg, defendant, to declare forfeited a contract for the sale of real estate and for other equitable relief. From a decree in favor of complainants, defendant appeals.

The issues in this case are practically identical with those involved in *Summers v. Hedenberg, ante*, page 460. The land involved in this case and that involved in the *Summers* case, *supra*, were parts of the same tract, which had been originally owned by Summers. In this case the defendant entered into a contract with the complainants for the purchase of the land involved herein, and the purchase price of the land involved in this case was the same as that of the land involved in the *Summers* case, *supra*. The two contracts contained the same provision as to deposits of the contract and earnest money with the Chicago Title and Trust Company and the right of the complainants to retain the earnest money if defendant failed to perform the contract on his part. Many of the questions involved in the two cases are identical and in that respect the Appellate Court makes reference to such case.

In the instant case the abstract was delivered to defendant, who made no objection to the title. When the time for the payment of \$4,000 arrived, defendant, on repeated demands, failed to pay the money, and also failed to pay the \$5,000 when it fell due on the ground that he did not have the money. The master from the evidence concluded that the only reason that defendant did not make the payments was that he was unable to raise the money, as he never gave any other reason nor made any objection to the title of appellees. A notice similar to that given in the *Summers* case, *supra*, was given by complainants to defendant April 13th, and, defendant having failed to make any payments, complainants caused defendant to be served with another notice that on account of his failure to perform the provisions of the contract, make the payments necessary and comply with said first notice, they had elected to declare the contract null and void and to retain the purchase money. May 29, 1914, defendant filed in the recorder's office an affidavit similar to the affidavit filed in the *Summers* case, *supra*. He never

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made payment of either the \$4,000 or the \$5,000 to the Chicago Title and Trust Company, nor offered to do so. No argument was made before the master of any defect in complainants' title, and no argument on this question was made before the court on exceptions to the master's report. It was argued for the first time in this court.

The grounds of reversal urged were: First, that complainants were in default at the time of the service of the notice of April 13, 1914, and were not entitled to forfeit and retain the earnest money, because there was no proof that at the time of the service of the notice they had perfect title to the property; second, that complainants did not tender a deed nor prescribe the form of trust deed; third, that the notice did not give a reasonable time for performance; fourth, that a court of equity will not aid the complainants.

BRADLEY, HARPER & EHEIM, for appellant.

RUBENS, FISCHER, MORAN & BARNUM, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 111***—*when evidence sufficient to sustain finding that contract purchaser of land refused to perform contract because of financial inability.* Where defendant, in an action to declare a contract for purchase of land forfeited, bought such land from complainant, and upon delivery of the abstract to him failed to make payments due under the terms of the contract, evidence held sufficient to sustain a finding of the master that the reason why defendant did not make the payments was his inability to raise the money, it not appearing that he gave any other reason or made any objection to the title of complainants.

2. **VENDOR AND PURCHASER, § 56***—*when objections to contract of purchase of land waived.* By basing his refusal to perform a con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tract for the purchase of real estate on his inability to do so, a contract purchaser waives all other grounds of objection.

3. **VENDOR AND PURCHASER, § 111***—*when evidence insufficient to establish giving of additional time to vendee for payment of purchase price.* On a bill to declare forfeited a contract for the purchase of land, evidence held insufficient to establish that vendors agreed to give vendee additional time for payment of the purchase price, it appearing that his refusal to perform was upon the sole ground that he did not have the money to make the payments.

4. **VENDOR AND PURCHASER, § 148***—*when purchaser waives objection to title.* Where a conveyance is refused on the ground that the purchaser does not have the money, he cannot object to the title.

5. **VENDOR AND PURCHASER, § 135***—*when not necessary that vendor have title to land.* It is not necessary that vendors of real estate have title until the time they have agreed to deposit a deed in escrow, if before that time the vendee had made default and could not require the vendors to obtain title.

6. **VENDOR AND PURCHASER, § 151***—*when tender of deed not necessary.* Where vendors of real estate in their contract of sale have agreed to deposit the deed with a third party after the vendee has deposited purchase money in accordance with the contract, a tender of the deed is not necessary, and all that is necessary is an offer by the vendors to make a deed and deposit it, providing the vendee would deposit the payments and perform his contract.

7. **VENDOR AND PURCHASER, § 151***—*when tender of deed unnecessary.* The law does not require a needless formality, and an actual tender of a deed is unnecessary where the seller is ready, able and willing to perform on his part, and a tender would be a mere useless form.

8. **VENDOR AND PURCHASER, § 118***—*when vendor need only prove ability and willingness to perform contract.* If before or at the time of performance the purchaser has declared his intention not to perform, or refuses to do so, the seller need only prove that he was ready and willing to perform on his part.

9. **VENDOR AND PURCHASER, § 118***—*when tender of performance by vendor unnecessary.* If tender of performance by the vendor would prove ineffectual, the law does not require a vain act, and such tender is unnecessary.

10. **VENDOR AND PURCHASER, § 111***—*when evidence insufficient to show that notice of forfeiture unreasonable.* On a bill by a vendor to declare void a contract of sale of land and to require payment of earnest money to complainant by a trustee, evidence held insufficient to show that the notice of forfeiture of earnest money was unreasonable.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rudnick v. City of Chicago, 198 Ill. App. 474.

11. EQUITY, § 512*—*when decree does not declare a forfeiture.* A decree on a bill by a vendor to declare void a contract of sale of land and to require payment of earnest money is not objectionable where it does not in itself decree or declare a forfeiture but merely decrees that defendant by his own acts prior to the filing of the bill rescinded the contract or caused a forfeiture, and that the title to the earnest money was in complainants at the time the bill was filed.

12. EQUITY, § 512*—*when decree for payment of earnest money does not provide for forfeiture.* Earnest money in the hands of a trustee belonging to the seller because of the default of the purchaser cannot be returned to the purchaser but may be decreed to be paid by the trustee to the seller, and such a decree does not provide for the enforcement of a forfeiture.

13. VENDOR AND PURCHASER, § 67*—*when vendor entitled to earnest money.* Earnest money is a guaranty that the contract will be performed, and if the sale goes on, it applies as part payment of the purchase money, but if there is a default on the part of the purchaser, he has no right to recover the deposit and it belongs to the seller.

Albert W. Rudnick, Administrator, Defendant in Error, v. City of Chicago et al., Plaintiffs in Error.

Gen. No. 20,897. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1915. Reversed. Opinion filed April 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Petition for mandamus by Albert W. Rudnick, administrator of the estate of James F. Scannell, deceased, against the City of Chicago *et al.*, respondents. From a judgment awarding the writ, respondents bring error.

The relator obtained from the Circuit Court a writ

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of mandamus reinstating him into the claimed office of "meter setter" in the Department of Public Works of the City of Chicago. Since the writ was sued out respondents suggested the death of relator and his administrator was substituted and duly summoned, and while his appearance had been entered he failed to file briefs or argue the cause.

The cause was tried before the court upon the petition as twice amended, the answer of respondents and a stipulation of fact. The relator had before the filing of the petition been dismissed upon a trial before the Civil Service Commission, in conformity with the requirements of the civil service law. The relator averred that the Department of Public Works was created by ordinance passed April 18, 1881; that thereafter, by the Revised Code of the City of Chicago, 1897, the said department was established as an executive department of the municipal government of Chicago known as the Department of Public Works, embracing the Commissioner of Public Works and such other employees as the city council may by ordinance prescribe and establish.

By no averment of the petition as amended was it made to appear that the city council by ordinance created the office of "meter setter," nor was any such ordinance cited in such amended petition.

JOHN W. BECKWITH, JOSEPH F. GROSSMAN and JOHN E. FOSTER, for plaintiffs in error.

A. D. GASH, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CIVIL SERVICE, § 27*—*when petition in mandamus for reinstatement of meter setter insufficient.* Where a petition for mandamus to reinstate petitioner in the office of "meter setter" in the Depart-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rudnick v. City of Chicago, 198 Ill. App. 474.

ment of Public Works of the City of Chicago averred that such Department of Public Works was created by an ordinance passed in 1881, and that by the Revised Code of Chicago of 1897 said department embraced the Commissioner of Public Works and such other employees as the city council might by ordinance prescribe and establish, but by no averment of the petition was it made to appear that the city council by ordinance created the office of "meter setter," *held* that such petition was insufficient as it did not plead any ordinance showing the creation of the office.

2. CIVIL SERVICE, § 10*—*when Civil Service Commission has no power to create office.* The Civil Service Commission has no power to create the office of "meter setter" in the Department of Public Works in Chicago but can only classify the offices created by ordinances of the city council.

3. MANDAMUS, § 139*—*when petition in mandamus to compel reinstatement of officer insufficient.* In mandamus proceedings where the existence of the office is claimed, it must be made to appear by appropriate averments that the office was created in the manner prescribed in cases of such character.

4. EVIDENCE, § 10*—*when judicial notice not taken of municipal ordinances.* Courts of general jurisdiction do not take judicial notice of municipal ordinances, but he who relies upon such an ordinance must allege and prove it as a matter of fact.

5. CIVIL SERVICE, § 27*—*when proceeding for mandamus not remanded.* Writ of mandamus having been issued to reinstate relator to office of "meter setter" in the Chicago Department of Public Works, the Appellate Court, in reversing the judgment of the trial court, will not remand the cause, it appearing that relator was not entitled to the writ and is dead.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frank O. Harney, alias Frank O. Youngblood, Defendant in Error, v. John Joseph Wilson (Plaintiff in Error), William P. Behen et al., Defendants in Error.

John Joseph Wilson, Plaintiff in Error, v. William P. Behen, Personally, et al., Defendants in Error.

Gen. No. 21,029.

1. **WILLS, § 168***—*when Circuit Court no jurisdiction to entertain bill to contest will.* The time for filing a bill in chancery to contest a will as limited in Hurd's Rev. St., ch. 148, sec. 7 (J. & A. ¶ 11548), is a jurisdictional fact, without proof of which the Circuit Court cannot proceed, and unless relief is sought within the statutory time the court has no jurisdiction to entertain the bill.

2. **WILLS, § 163***—*when equity no jurisdiction to entertain bill to construe will.* Under Hurd's Rev. St., ch. 148, sec. 7 (J. & A. ¶ 11548), providing that one who seeks to contest a will must appear by his bill in chancery within one year after the probate of such will, the right to contest given by the statute does not exist without it, and one who seeks to avail himself of such statute must show that he is within its provisions where he does not come within the excepted classes of infants and persons *non compos mentis*.

3. **WILLS, § 175***—*when cross-bill to contest will automatically dismissed.* When a court decrees that complainant who seeks to contest a will is not an interested party and for that reason only dismisses the original bill, the cross-bill filed in such cause automatically suffers the same fate.

4. **WILLS, § 168***—*when statute of limitations begins to run as to right to contest will.* Where a will and codicil are admitted to probate by order of the Probate Court and thereafter an appeal is taken from such order to the Circuit Court which affirms it, the probate of the will and codicil is firmly and finally fixed on the date when such judgment of affirmance is recorded in the Probate Court, and under Rev. St., ch. 148, sec. 7 (J. & A. ¶ 11548), all parties in interest are limited to a year from such date within which to contest such will and codicil.

5. **WILLS, § 169***—*who may contest.* The right to contest a will by statute is confined to those having an interest therein, and no one is permitted to maintain a bill without such interest.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harney v. Wilson, 198 Ill. App. 477.

6. WILLS, § 171*—*when cross-complainant in suit to contest will estopped by admissions to claim interest of complainant to maintain bill.* Where complainant in a suit in chancery to contest a will was adjudged never to have had any interest in such will and the correctness of such finding was not challenged by cross-complainant, who was the only person interested in that phase of the decree, *held*, that such cross-complainant in effect admitted complainant's lack of interest, and that complainant therefore had no right at any time to maintain the bill.

7. WILLS, § 175*—*what is effect of dismissal of bill to contest will.* Where a suit to contest a will and codicil is commenced previous to the date when such will and codicil are admitted to probate, and more than two years later a cross-bill to contest the validity of the codicil is filed in such suit, and complainant is not an interested party, and the court so determines in dismissing his bill, the position of the parties remains the same as it would have been had complainant never filed his bill, and hence no bill has been filed by any person interested in the will of deceased within the time limited by Rev. St., ch. 148, sec. 7 (J. & A. ¶ 11548).

8. WILLS, § 168*—*when answer to bill to contest will does not constitute assertion of right to contest will within statutory limit.* An answer to a bill of complaint filed to contest a will and codicil cannot be considered as an assertion of a right to contest such codicil within the time limited by Rev. St., ch. 148, sec. 7 (J. & A. ¶ 11548), when it is not filed until more than two years have elapsed since the order of probate.

Error to the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed April 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

CRUICE & LANGILLE, for plaintiff in error; A. S. LANGILLE and D. RYAN TWOMEY, of counsel.

CASTLE, WILLIAMS, LONG & CASTLE, for defendants in error; ARISTA B. WILLIAMS, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This litigation involves a contest of the will of Edward Harney. We will state the order of events necessary to a decision and understanding of this case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edward Harney died in Chicago September 23, 1910, testate. His will was dated April 5, 1910, and a codicil thereto was added September 15, 1910. By the will plaintiff in error, who was no blood kin of the testator, was bequeathed about one-third of his estate and the other two-thirds were bequeathed to certain of his collateral kin, he having died without descendants. The codicil revoked the bequest to Wilson, the plaintiff in error. The will and codicil were admitted to probate in the Probate Court of Cook county, November 29, 1910. From the order so admitting the will and codicil to probate, Wilson, plaintiff in error, appealed to the Circuit Court, where the order of the Probate Court was not varied. The action of the Circuit Court on this appeal was duly certified to the Probate Court, which, by an order of record entered October 6, 1911, recorded that fact. On August 18, 1911, Frank O. Youngblood, who called himself "Harney" and who claimed to be a son of the testator, filed a bill, found in the record, to set aside the will and codicil, on the contention that the testator was not of sound mind and memory at the time he executed will and codicil; that the will and codicil were procured by fraud and duress; and asking that the testator be decreed to have died intestate and that his estate be distributed among his heirs at law. To this bill Wilson was a party defendant, and by his answer admitted the validity of the original will but claimed that at the time the codicil to the will admitted to probate was executed by the testator he was not of sound mind and memory, but was suffering with disease; that his mind was so impaired at that time as to render him wholly incapable of making a just and proper distribution of his estate. On March 4, 1914, plaintiff in error, Wilson, obtained an order permitting him to file his cross-bill, which he did on that date, making practically the same averments in regard to the validity of the will and the invalidity of the codicil as made in his answer, and

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praying *inter alia* that the will of the testator probated November 29, 1910, be declared to be his last will and testament, and that the codicil be declared null and void and of no effect. By agreement the question of heirship of the testator was tried, and on June 27, 1914, a decree was entered finding heirship and decreeing that the complainant in the original bill was not the son and heir of the testator, but that he was a bastard son of one Elma Hupp and was not a person interested in the estate of the testator, and that by reason thereof the court was without jurisdiction of the subject-matter of the bill of complaint, and dismissing complainant's bill for want of equity and also dismissing the cross-bill, as amended, of the plaintiff in error.

Plaintiff in error is the only party to the cause questioning the verity of the decree dismissing the bill and cross-bill as amended, and his contention is that they should not have been dismissed.

In this condition of the record but one question is pertinent for our decision, and that is whether plaintiff in error can be said to have filed his bill to contest the will of Edward Harney, deceased, within the time limited by section 7, chapter 148, Rev. St. (J. & A. ¶ 11548), which is one year. That part of section 7 in which the limitation occurs reads: “* * * that if any person interested shall, within one (1) year after the probate of any such will, testament or codicil * * * appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, * * * according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or *non compos mentis* the like period after the removal of their respective disabilities. * * *” The right to contest a will is one given by the statute and without it no such

right exists. Therefore, as plaintiff in error is not within the exception of the statute as either an infant or *non compos mentis*, it follows that in seeking to avail of such statute he must show that he is within its provision. In *Storrs v. St. Luke's Hospital*, 75 Ill. App. 152, the court said: "The jurisdiction of chancery in the contest of wills is statutory, and the statute must be strictly construed. It is not a statute of limitation, but confers a new right or privilege which did not exist before the statute. Unless the bill is filed within three years of the probate of the will, or excused by the letter of the statute, the court has no jurisdiction."

Under the statute as it existed prior to 1903 the time in which to file a bill to contest a will was limited to three years, and as said in *Luther v. Luther*, 122 Ill. 558: "The court has no power to entertain the bill after the three years have passed." The time limited is a jurisdictional fact, without proof of which a court of chancery cannot proceed. Unless the relief is sought within the statutory time, the court has no jurisdiction to entertain the bill. When the court decreed that complainant was not an interested party and for that reason only dismissed the original bill, the cross-bill automatically suffered the same fate.

In *Loomis v. Freer*, 4 Ill. App. 547, it was said that "where an original bill in chancery is dismissed for want of jurisdiction, a cross-bill filed in the same cause, must follow the fate of the original bill."

The probate of the will and codicil of Harney became firmly and finally fixed on October 6, 1911, when the Probate Court entered an order reciting the judgment of the Circuit Court in disposing of plaintiff in error Wilson's appeal. All parties in interest were limited under the statute to one year from October 6, 1911, in which to contest by bill in chancery the validity of the will. The right to contest a will by the statute is confined to those persons having an interest in

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the will, and no one who is without interest in the will is permitted to maintain a bill. The complainant in the original bill had no interest in the will of Harney, the testator, and never had, as adjudged by the decree in the record. The correctness of this finding of the decree is not challenged by the only party interested in that phase of the decree. This finding of the decree is binding upon all persons to the cause, including plaintiff in error. In other words, plaintiff in error stands before the court as admitting that complainant had no interest in the will and codicil set forth in his bill, and therefore no right at any time to maintain the bill. The complainant was not an interested party, and when the court so determined and dismissed his bill the position of the parties was the same as it would have been had complainant never filed his bill. It therefore follows, as matter of law, that no bill was filed by any person interested in the will of Edward Harney, deceased, within the time limited by section 7, *supra*.

If we should concede, which we do not, that plaintiff in error by his answer invoked the relief afterwards prayed in his cross-bill, still, as he did not file his answer until March 4, 1914, he did not assert his right to contest the will or codicil of Edward Harney within the time limited by the statute. It is consequently apparent that no party to this record interested under the will and codicil of Edward Harney, deceased, filed any bill or commenced any proceeding to contest such will or codicil within the time provided by the statute.

As the court had no jurisdiction to entertain either the bill of complaint or the cross-bill of defendant, the decree of the Superior Court dismissing both of them was without error, and that decree is therefore affirmed.

Affirmed.

**Sol Finkel, Defendant in Error, v. Samuel Springer,
Plaintiff in Error.**

Gen. No. 21,527. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by Sol Finkel, plaintiff, against Samuel Springer, defendant, for one hundred and fifty dollars loaned by plaintiff to defendant. From a finding and judgment for one hundred and fifty dollars in favor of plaintiff, defendant brings error.

Plaintiff claimed to have loaned defendant one hundred and fifty dollars with which to pay money that defendant lost at gambling. Defendant invoked Rev. St., ch. 38, sec. 131 (J. & A. ¶ 3734) as a defense. It was not contended that the one hundred and fifty dollars loaned, or any part of it, was paid to plaintiff as money won by him from defendant at the gambling game of poker or any other gambling game of cards. It seemed, however, that plaintiff and defendant and five other men were playing poker at plaintiff's house and that defendant lost one hundred and ninety dollars, and having only forty dollars with him, at the conclusion of the game borrowed the one hundred and fifty dollars from plaintiff and paid it, together with the forty dollars he had with him, to the persons who had won various amounts of money from him.

LEON A. BEREZNIAK, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Finkel v. Springer, 198 Ill. App. 483.

Abstract of the Decision.

1. GAMING, § 43*—*when evidence sufficient to sustain finding that plaintiff loaned money to defendant to pay gaming debts.* In an action for money loaned to a gambler to pay gaming debts, where two witnesses corroborated plaintiff's account of the transaction and defendant's testimony was not supported by any other witness, *held* that the issues were properly found for the plaintiff.

2. GAMING, § 19*—*when person loaning money to gambler to pay gaming debts may recover amount of loan.* Where one person loans another a sum of money after the playing of a poker game is concluded, for the purpose of paying the persons who had won from the latter in such game, but does not participate in the game, he may recover such money in an action therefor, and it is immaterial that the lender may have knowledge of the purpose for which the money is borrowed, and that it is to be disbursed to pay gaming debts.

3. GAMING, § 19*—*when gaming statute may not be invoked as defense to action for money loaned to gambler.* Rev. St., ch. 38, sec. 31 (J. & A. ¶ 3734), cannot be invoked as a complete defense in an action to recover money loaned to pay gambling debts, unless plaintiff has received some part of the money loaned back again as money that he had won from defendant in the gambling transaction.

4. CONTRACTS, § 125*—*when obligation indirectly connected with illegal transaction enforceable.* An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration so that the plaintiff does not require the aid of the illegal transaction to make out his case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Lars Saarela, Defendant in Error, v. Carl Hoglund,
Plaintiff in Error.****Gen. No. 21,558.**

1. **MASTER AND SERVANT, § 11***—*when contract of employment definite as to time.* An agreement made in May for an employment to continue "until the winter is over" is definite as to time as the court will take judicial notice that winter comprises a period of three months, whether reckoned astronomically from the winter solstice, on December 22nd, to the vernal equinox, on March 21st, or according to the conventional method used in the United States as including December, January and February.

2. **EVIDENCE, § 20***—*when court will take judicial notice of the seasons of the year.* The courts will take judicial notice of the seasons of the year.

3. **MASTER AND SERVANT, § 50***—*when evidence sufficient to sustain finding that servant arbitrarily discharged.* In an action by a servant against his master for damages for breach of the contract of employment, evidence held sufficient to sustain a finding that plaintiff was arbitrarily discharged, it appearing that the right to so discharge him rested on the contention that he failed to return on a Saturday evening to clean out the ashes in the furnace after having, with the assumed consent of his employer, completed his work; that plaintiff was a union baker and that nine hours constituted a day's work of a union baker; that on such Saturday, plaintiff had worked three and one-half hours in excess of that time, and that cleaning out the ashes from the furnace was not a part of plaintiff's duty but devolved upon plaintiff's assistant, and that defendant did not claim that plaintiff's service as a baker was not satisfactory.

4. **MASTER AND SERVANT, § 30***—*when work of servant must be satisfactory to the employer.* It is implied in every contract of employment that the work of the servant, without any specific agreement, must be done to the satisfaction of his employer.

5. **MASTER AND SERVANT, § 29***—*when master may not discharge servant.* Even though an employer has the right to discharge an employee "for any reason," if he in fact discharges him without any reason and without cause, he breaks the contract of employment and is liable for damages.

Error to the Municipal Court of Chicago; the Hon. P. B. FLANAGAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Saarela v. Hoglund, 198 Ill. App. 485.

EDWARD A. MECHLING, for plaintiff in error.

M. EMMETT CLARE and OTTO CHRISTENSEN, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

In this action plaintiff, a journeyman baker, sued his employer, a master baker, for breach of a contract of employment, and on a trial before the court had his damages assessed at \$85, and judgment was entered against defendant for that sum, in an effort to reverse which judgment defendant prosecutes this writ of error.

The learned trial judge made the following finding of fact: That plaintiff and defendant entered into a verbal contract May 3, 1914, whereby defendant agreed to employ plaintiff and plaintiff agreed to work for defendant as a baker at a weekly wage of \$20 from that date "until the winter was over"; that in August, 1914, plaintiff procured another position, and after being absent one day returned to the employment of defendant at a wage of \$17 per week, upon the statement of defendant that he would keep plaintiff "over the winter"; that defendant discharged plaintiff without cause on the 8th of November, 1914, and that plaintiff was unable to secure other employment until February 15, 1915, when he obtained a position at \$23 per week; and further found that plaintiff was entitled to recover \$85 as damages from defendant for his breach of contract.

A perusal of the testimony sustains, in our opinion, the court's findings. Defendant, however, urges for reversal that the contract was not for a definite time, that defendant discharged plaintiff, as he lawfully might, and that plaintiff at the utmost cannot recover for more than one week's wages. We are unable to acquiesce in these contentions. In the first place, the

contract was for a definite time. We think that the agreement made in May for an employment to continue "until the winter was over" is definite. Astronomically, winter begins in the latitude in which Chicago is situate when the sun enters Capricorn, at which time the sun is at its greatest distance from the equator, or at the winter solstice, about December 22nd, and ends with the commencement of the vernal equinox, which occurs about March 21st. This is a period of three months. In the United States the winter months are conventionally reckoned as comprising the months of December, January and February. Among other things, the court will take judicial notice of the seasons of the year; therefore, by which ever method winter is measured, it comprises three months. This makes the contract certain as to time.

The right to discharge plaintiff rests in the contention that he failed to return at the command of defendant on a Saturday evening after having, with the assumed assent of his employer, completed his work, for the purpose of cleaning out the ashes in the furnace. Plaintiff was a union baker, and it is not denied that nine hours constituted a union baker's day's work. On the Saturday in question plaintiff had worked three and one-half hours in excess of that time. We think the evidence demonstrates that the cleaning of the ashes from the furnace was not a part of plaintiff's duty as a baker, but that that duty devolved upon plaintiff's assistant.

The work of the servant, without any specific agreement, must be done to the satisfaction of his employer; this is implied in every contract of employment. Defendant makes no contention that plaintiff's service as a baker was not satisfactory. His discharge, therefore, for not removing the ashes was arbitrary and not justified by the terms of the employment contract. While it might be conceded that defendant had the right to discharge plaintiff "for any reason," defend-

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ant in fact discharged plaintiff without any reason and without cause. *Margulies v. Oppenheimer*, 159 Ill. App. 520. In so doing he breached the contract and is liable for the damages which the trial court assessed against him.

The judgment of the Municipal Court being without error is affirmed.

Affirmed.

Charles W. Gindele, Executor of the Estate of Emma Gindele, Deceased, and Frank C. Conover, Plaintiffs in Error, v. Charles M. Conlon, Defendant in Error.

Gen. No. 21,566.

1. **ABATEMENT AND REVIVAL**, — *when proceeding to assess damages on dissolution of injunction does not survive.* Neither at common law nor under the statute (J. & A. § 172) does a proceeding to assess damages upon the dissolution of an injunction survive either in favor of the parties moving for the assessment or against the executors of the parties against whom the assessment is sought.

2. **ABATEMENT AND REVIVAL**, — *when suggestion of death made too late.* On a proceeding to assess damages on the dissolution of an injunction in which a decree has been entered and an appeal prayed and allowed, and the record in which contains nothing to show that either of the complainants in the injunction suit died before the entry of the decree, but which fact only appears by an incidental affidavit of counsel on a motion to vacate the decree, counsel cannot be heard, on a writ of error to reverse the judgment in the proceeding for damages, to contradict the representations which they, by their appearance for complainants in the trial, assumedly made to the trial court as to the complainants being alive.

3. **APPEAL AND ERROR**, § 615*—*when parties to writ of error must be same as parties to decree complained of.* The parties to a writ of error must be the same as the parties to the decree in the trial court which it is sought to reverse.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gindele et al. v. Conlon, 198 Ill. App. 488.

Error to the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1915. Writ dismissed. Opinion filed April 10, 1916. Rehearing denied April 24, 1916.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for plaintiffs in error; MITCHELL D. FOLLANSBEE and FRED BARTH, of counsel.

HARRY A. BLOSSAT, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The writ of error sued out in this case seeks a reversal of the decree awarding damages on the dissolution of an injunction granted in the case of Emma Gindele and George A. Gindele, complainants, against Charles M. Conlon and others, defendants, in favor of the defendant Charles M. Conlon. The bill was filed on August 20, 1914, and the injunction dissolved and the bill dismissed on the motion of complainants on February 9, 1915, and on March 29, 1915, a decree was entered awarding damages in the sum of \$613.27 in favor of the defendant Charles M. Conlon and against complainants for the wrongful issuance of said injunction. From this decree complainants prayed and were allowed an appeal to this court. On April 17, 1915, complainants made a motion to vacate the decree, which was denied on the 19th of April thereafter. Defendant in error now moves to dismiss the writ of error and, contending that no other questions are pertinent for discussion upon the record in the case, declines to argue the contentions of plaintiffs in error urged in their brief and argument for a reversal.

We see no way to disagree with the defendant in error in his suggestion that the writ of error be dismissed. We are not unmindful that a proceeding to assess damages upon the dissolution of an injunction does not survive either in favor of the representatives

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of the parties moving for the assessment or against the executors of the parties against whom the assessment is sought. *Phelps v. Foster*, 18 Ill. 309; *Gorton v. Brown*, 27 Ill. 489. Such an action does not survive under section 122, ch. 3, Rev. St. (J. & A. ¶ 172). Neither does any such action survive by the common law. *Dempster v. Lansingh*, 166 Ill. App. 261.

In the condition of this case the remedy is on the injunction bond, where appropriate defenses may be interposed if there are any. Were plaintiffs in error in a position to invoke in their favor the law above cited, viz., that the right to an assessment of damages for the dissolution of an injunction does not survive, they must succeed; but they are not in such position. There is nothing in this record to show that prior to the decree sought to be reversed either of the complainants, George A. Gindele or Emma Gindele, was dead. It was only after the decree was entered and appealed from and an appeal prayed and allowed that complainants moved to vacate the decree and, incidentally, by an affidavit of one of their counsel, denoted the fact that Emma Gindele is dead and that she died November 23, 1914. If the Gindeles were dead at the time the decree was entered, then counsel had no authority to appear for them. The death of the Gindeles revoked the authority of their counsel.

In the condition of this record we cannot assume that either of the Gindeles was dead at the time the decree involved in this writ of error was entered. That counsel were appearing for them led to the assumption that they were in life, and in the verity of that assumption the decree was entered. Neither can we straighten out the tangle in this proceeding resulting from the actions of counsel in allowing the cause to proceed to a decree without suggesting the death of their clients and by such actions causing the court to assume that their clients were still in life. They cannot in this proceeding be heard in contradiction of the represen-

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tations which they by their appearance for complainants in the trial assumedly made to the trial judge and which eventuated in the decree complained about. Whatever the fact may be, the record before us shows affirmatively that the Gindeles were alive at the time the decree was entered. That record only is before us for review and we cannot *dehors* that record assume that they are dead. Furthermore, the parties to this writ of error, as appears from the record, are not the same as the parties to the decree in the trial court. This violates the well-settled rule of practice in this State that they must be. *Wuerzburger v. Wuerzburger*, 221 Ill. 277.

For the reasons above given we are of the opinion the writ of error was improvidently sued out and that the motion to dismiss must be sustained.

The writ of error is accordingly dismissed.

Writ dismissed.

**August Leroy, Plaintiff in Error, v. Minerva V. Scott,
Defendant in Error.**

Gen. No. 21,632. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN H. FORNOFF, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by August Leroy, plaintiff, against Minerva V. Scott, defendant.

It is stated in the abstract that the declaration is in an "action of debt on a foreign judgment laying damages \$79.50." It appears that a judgment by default was entered and then set aside; that pleas of *nil debet*

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and of *nul tiel record* were subsequently filed; that a replication to the plea of *nul tiel record*, concluding with a verification, was filed, and that an *ore tenus* demurrer to the plea of *nil debet* was sustained. Then follows the judgment of *nil capiat*, which recites that submission of the cause for trial by the court was pursuant to the stipulation of the parties. Subsequent to the entry of the judgment, defendant filed, by leave of court, a plea of *puis darrein continuance*. No issue was joined on this plea. Plaintiff then moved to vacate the judgment, and the motion being overruled brings error.

ROBERT H. HOLMES, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 892*—*when judgment affirmed where abstract insufficient.* The abstract of the record is the pleading of the plaintiff in error beyond which a court of review will not look for grounds of reversal, and the judgment will be affirmed where the abstract is practically nothing more than an index of the record, and fails to show any error of procedure or in the pleadings, even though it is accompanied by a full transcript.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holmes v. Scott, 198 Ill. App. 493.

Robert H. Holmes, Plaintiff in Error, v. Minerva V. Scott, Defendant in Error.

Gen. No. 21,633. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN H. FORNOFF, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by Robert H. Holmes, plaintiff, against Minerva V. Scott, defendant.

The record and abstract in this case are in all essential particulars the same as in the case of *Leroy v. Scott*, Gen. No. 21,632, *ante*, p. 491. For the reasons appearing in the *Leroy* opinion, *supra*, the judgment of the Circuit Court was affirmed.

ROBERT H. HOLMES, *pro se*.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Cermak v. P. A. Starck Piano Co. et al., 198 Ill. App. 494.

Anton J. Cermak for use of Henry Stark, Defendant in Error, v. P. A. Starck Piano Company and United States Fidelity & Guaranty Company, Plaintiffs in Error.

Gen. No. 21,676. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action on a replevin bond by Anton J. Cermak for use of Henry Stark, plaintiff, against P. A. Starck Piano Company, a corporation, and United States Fidelity & Guaranty Company, defendants.

Plaintiff in a trial by the court had judgment for \$400 debt, the penalty of the bond, and \$254 damages in the usual form, to reverse which defendants prosecute this writ of error.

The replevin bond sued upon was given in a replevin suit, under which the defendant piano company took the piano of plaintiff. The replevin suit resulted in a judgment in favor of plaintiff and the award of a writ of *retorno habendo* for the piano. The piano was not returned.

Defendants tendered in defense a writing claimed to be a contract between plaintiff and the piano company for the purchase of the piano in question on the so-called "instalment plan." It was claimed that under this contract plaintiff was behind in his payments at the time of the suing out of the replevin writ, and that thereby, under the contract, the piano was the property of the piano company and it had the right to reduce it to possession. Plaintiff denied that he signed the contract, but claimed that all he signed was a delivery ticket. Defendants' witness, Laury, while testifying that plaintiff signed the proffered contract, admitted

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that it had been changed in several material particulars and that a large part of its terms had been added since plaintiff signed it. There was no proof that plaintiff assented to any of the changes made in the alleged contract. The court excluded the writing because such material changes and alterations had been made without the assent of plaintiff.

MARTIN CONNOR, for plaintiffs in error.

GEORGE M. WEICHELT, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 134*—*what measure of damages where property not returned.* Where a replevin suit results in a judgment in favor of plaintiff and the award of a writ of *retorno habendo* and the property is not returned, the measure of plaintiff's damages in a suit on the bond is the value of the property together with his costs.

2. ALTERATION OF INSTRUMENTS, § 14*—*what effect of material alteration in instrument sued on.* Where a defendant in replevin sets up as his sole defense an alleged contract, the making of which is denied by plaintiff, and admits having made material alterations therein after its execution and no evidence is introduced to show plaintiff's assent to the changes, the court properly excludes the writing and finds title to the property in plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Marcus et al. v. Ratsky et al., 198 Ill. App. 496.

Abraham L. Marcus and Morris Marcus, trading as Marbro Mills, Defendants in Error, v. Morris Ratsky and Abraham L. Stone, trading as Ratsky & Stone, Plaintiffs in Error.

Gen. No. 21,714.

1. DEPOSITIONS, § 22*—*when deposition of assignor of account inadmissible in suit by assignee.* In a suit upon an assigned account, a deposition of the assignor taken by defendants is inadmissible under section 33 of the Municipal Court Act (J. & A. ¶ 3344), where there is no evidence that the assignor was in any manner connected with or interested in the assignee or its business, or that he was liable as assignor to the latter in the event that assigned account was not collected.

2. CONSPIRACY, § 13*—*when evidence inadmissible.* Before evidence of a conspiracy is admissible against a party to a suit, such party must first be proven to have been a co-conspirator with the person whose statements out of his presence, are proposed to be given in evidence.

3. EVIDENCE, § 221*—*when inadmissible as hearsay.* In a suit on an assigned account, the evidence in which shows that a check had been sent in payment of the account but had come into the hands of a third person who changed the name of the payee, raised the amount and cashed the check, the deposition of a third person as to other similar transactions is inadmissible where no connection is shown between plaintiffs and deponent.

4. EVIDENCE, § 67*—*when inadmissible as irrelevant.* In a suit on an assigned account, certified copies of documents in a bankruptcy proceeding against the assignor in a Federal court in another district are properly excluded as irrelevant.

Error to the Municipal Court of Chicago; the Hon. SHERIDAN E. FRY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

EUGENE M. BUMPHEY, for plaintiffs in error.

WILLIAM HELFAND and BENJAMIN H. EHRLICH, for defendants in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE HOLDOM delivered the opinion of the court.

A judgment on the finding of the court for \$282.48 in favor of plaintiffs is the subject of this review. It is admitted that if plaintiffs are entitled to recover at all, the amount of the judgment should stand.

Plaintiffs bought from Joseph Seiden an account against defendants for goods sold and delivered to the amount of the judgment. Plaintiffs bring suit in their own name in force of section 18, ch. 110, Rev. St. (J. & A. ¶ 8555).

The difficulties here encountered arise from the fact that defendants attempted to pay the account in suit by drawing their check for the amount due to the order of plaintiffs and transmitting the same to plaintiffs by mail. This check never reached plaintiffs. In some way not satisfactorily explained the check fell into the hands of some dishonest person who raised it to \$382.48, changed the name of the payee to "J. Wilner" and cashed the check as altered at the Night Bank of St. Louis, Missouri. The serious question for solution is whether the proofs in the record in any way connect plaintiffs with the forgery, and if not, whether, on the theory that the evidence excluded would, was such evidence admissible for that purpose. This raises the further question whether the deposition, taken by defendants, of Joseph Seiden, the assignor of the account in suit, was admissible in evidence under section 33 of the Municipal Court Act (J. & A. ¶ 3344), for which limited purpose only was it offered. This section reads:

"That upon the trial or hearing of any suit in the Municipal Court any party thereto or any person for whose immediate benefit such suit is prosecuted or defended or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such suit may be examined upon the trial thereof as if under cross-examination at the in-

Marcus et al. v. Ratsky et al., 198 Ill. App. 496.

stance of the adverse party or parties, or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination, as any other witness, to testify, but the party calling for such examination shall not be concluded thereby, but may rebut the testimony thus given by counter testimony."

The construction of this section is one of first impression, as up to the present time such section has not been construed by a court of review. We are inclined to the opinion that Seiden's deposition was properly excluded, in the limited way in which it was offered, because Seiden was neither a party to the cause nor beneficially interested in its outcome. There is no evidence that he was in any manner connected with or interested in plaintiffs or their business or that he was liable as assignor to plaintiffs in the event that the account assigned was not collected. Without making it to appear that Seiden was in some way beneficially interested in the suit, defendants could not under section 33, *supra*, avail of his evidence. Defendants proffered the deposition of Jacob Goldman, a self-confessed crook, which was taken in the "Tombs" prison in New York City, in an attempt to connect plaintiffs with the forged check. Goldman's testimony was not only unreliable but it was purely hearsay and in no way tended to connect plaintiffs with the forgery of the check of defendants sent to plaintiffs, or with any conspiracy to raise, alter or change any other checks. It seems that Goldman had been connected with a gang of forgers which had raised checks in transactions similar to the one between plaintiffs and Seiden, and that he had been many times arrested. Even his testimony is silent as to his having had any connection or transactions with plaintiffs. The exclusion of this deposition was without error. Before evidence of a conspiracy against a party is admissible, such party must first be proven to have been a co-conspirator with the person whose statements, out of the

Hoff v. L. Gould & Co., 198 Ill. App. 499.

presence of such party, is proposed to be given in evidence. *People v. Barkas*, 255 Ill. 516.

Defendants offered certified copies of certain documents in a bankruptcy proceeding against Seiden in the District Court of the United States for the Southern District of New York. The offer was rightfully denied on the grounds of irrelevancy and lack of proper authentication.

There is no evidence in the record either admitted or excluded which in any manner connects plaintiffs with the forgery of the check of defendants mailed to plaintiffs in payment of the account in suit.

There is no reversible error in the record and the judgment of the Municipal Court is affirmed.

Affirmed.

**Charles F. Hoff, Appellee, v. L. Gould & Company,
Appellant.**

Gen. No. 21,789. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of fact. Opinion filed April 10, 1916.

Statement of the Case.

Action by Charles F. Hoff, plaintiff, against L. Gould & Company, defendant.

The evidence showed that the defendant is a wholesale dealer in wooden and willow ware and house furnishing goods in Chicago, and until July 6, 1909, owned and operated horses and wagons, etc., and used the same in the hauling of its goods. On that day defendant discontinued doing its own teaming and sold all of its horses, wagons, harness and other teaming equipment to the plaintiff. On the same day the parties en-

tered into a contract which provided *inter alia* that plaintiff should do all defendant's teaming work for a period of five years; that it should for that purpose furnish defendant six double and two single teams with wagons, drivers and other necessary adjuncts, for which plaintiff was to receive from defendant as compensation \$1,000 on the first day of each month, during the life of the contract. There was also provision made for the supplying of additional teams as the exigencies of defendant's business might require. Among the material conditions of the contract, plaintiff agreed that during the term of the contract he would keep the wagons well painted, have defendant's name painted on them, and keep all the wagons, horses, harness, etc., in as good order and condition as the same were in when possession thereof was surrendered to plaintiff, and generally to carry on and conduct the teaming business incident to the business of defendant in a manner "satisfactory" to defendant. On failure of plaintiff to comply with the foregoing conditions in a manner "satisfactory" to defendant, the defendant might, on giving thirty days' written notice to plaintiff, declare the contract "forfeited and of no force or effect."

It was shown that plaintiff received the teaming outfit sold to him by defendant in first-class condition. The evidence showed that plaintiff kept the horses in an ungroomed condition; that the harness was not clean; that the wagons were not "well painted" or kept clean, but were habitually dirty; that there were many holes in the wagon covers, causing rain to percolate through and damage goods transported in such wagons; that, moreover, plaintiff's teamsters "loafed upon the job."

These conditions, when called to the attention of plaintiff, were not denied but excused. Plaintiff, in effect, replied on one occasion that he could not afford to live up to his contract. Defendant being dissatisfied

with conditions, availed of the right reserved by the contract to terminate it, and on February 13, 1913, gave plaintiff notice that the contract would be determined thirty days from that date. Since March 15, 1913, plaintiff has not done any teaming for defendant.

Action was brought on the ground that defendant wrongfully terminated plaintiff's contract, and to recover damages resulting to him from such alleged wrongful act. From a judgment for plaintiff for \$2,916, defendant appeals.

CHYTRAUS, HEALY & FROST, for appellant.

CHARLES V. BARBETT, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 387*—*when evidence sufficient to show breach.* In an action on a contract, evidence examined and *held* to show that plaintiff had failed to carry out the contract in material and essential particulars in accordance with its conditions.

2. CONTRACTS, § 387*—*when evidence sufficient to show failure to perform contract in "satisfactory" manner.* In an action on a teaming contract which required that plaintiff should perform the contract in a manner "satisfactory" to defendant, evidence examined and *held* to show that plaintiff did not perform the contract in such manner.

3. CONTRACTS, § 312*—*what constitutes "satisfactory" performance.* Where a contract provides that it is to be performed in a manner "satisfactory" to one of the parties, the provision must be construed as meaning that the performance must be such that the party, as a reasonable person, should be satisfied with it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Aurora, E. & C. R. Co. v. National Surety Co., 198 Ill. App. 502.

**Aurora, Elgin & Chicago Railroad Company for use of
Rochester Bridge Company, Plaintiff in Error, v.
National Surety Company, Defendant in Error.**

Gen. No. 21,841.

1. INDEMNITY, § 9*—*when indemnity bond not for benefit of third persons.* In action by the obligee of an indemnity bond against the surety for the use of a third person, the condition of the bond examined and the bond held not to be for the benefit of third persons.

2. PRINCIPAL AND SURETY, § 6*—*when obligation of surety strictly construed.* The obligation of a surety must be strictly construed and cannot be extended by implication or construction.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

EARL J. WALKER, for plaintiff in error; GEORGE W. HOLMAN, of counsel.

CHARLES H. BURRAS, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiff, by this writ of error, seeks to reverse a judgment of *nil capiat* entered against it on a trial before the court without a jury.

This action is based upon an indemnity bond, in which W. A. Melcher was principal and the defendant was surety and the plaintiff railroad company was the obligee. The bond was given to indemnify the railroad company against loss and damage which it might suffer by the failure or default of Melcher in a certain contract which Melcher had entered into with the railroad company to build and construct a certain addition to its engine room at its Batavia power house. Melcher made a contract with the usee, Rochester

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Aurora, E. & C. R. Co. v. National Surety Co., 198 Ill. App. 502.

Bridge Company, to furnish certain materials to Melcher for the carrying out of his contract with the railroad company, which it did. Melcher owed the use of bridge company \$2,943.41 for material furnished Melcher and used by him in building the addition to the railroad company's engine room, and failed to pay it. The theory of plaintiff's claim is that defendant was liable to pay Melcher's debt to the bridge company in virtue of the bond above recited.

The defense set up is: "That the bond set up in the plaintiff's statement of claim was not a bond given for the benefit of persons furnishing labor and material to the principal herein, W. A. Melcher, in the construction of the work under the contract between said W. A. Melcher and the Aurora, Elgin and Chicago R. R. Co., but was written for the use and benefit of the obligee in said bond, to-wit: the Aurora, Elgin & Chicago R. R. Co." Our decision must rest upon the legal interpretation of the condition of the bond, the subject-matter of this suit. It is as follows:

"Now therefore, the condition of the above obligation is such that if the above bounden principal shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said principal kept, done and performed, at the time and in the manner in said contract specified, and shall pay over, make good and reimburse to the above named obligee, all loss and damage which said obligee may sustain by reason of failure or default on the part of said principal, then this obligation shall be void, otherwise to remain in full force and effect."

At the close of plaintiff's case the court found the issues in favor of the defendant and entered judgment accordingly.

The bond under consideration was not made for the benefit of third parties and it cannot be so construed or held by any language used or condition to be found in it. It was strictly *inter* parties and was to indemnify

Aurora, E. & C. R. Co. v. National Surety Co., 198 Ill. App. 502.

the railroad company for any loss or damage accruing to it from the breaching by Melcher of his contract with it. The liberal construction of the bond contended for by plaintiff would not result in so expanding the obligation as to include any claim of the bridge company against Melcher short of reading into the bond a covenant or condition which is not to be found in it. Parties make their own contracts and courts have no power to impose conditions not made by the parties themselves. If the plaintiff railroad company had desired to have subcontractors or others protected, it should have been so nominated in the bond. The bond in this record in no particular is comparable to bonds in which third persons were granted relief in the cases cited by counsel for plaintiff. This case is more akin in fact and principle to *Searles v. City of Flora*, 225 Ill. 167, and the ruling in that case governs this. The party indemnified was the railroad company, and for its loss or damage only can defendant be held liable under its bond. As the court said in the *Searles* case, *supra*, so say we here: "We think the evidence in this case clearly shows that the bond and contract were not entered into with the intention of securing third parties as to labor and material furnished in the completion of said contract, but they were entered into for the purpose of securing * * *" the Aurora, Elgin & Chicago Railroad Company, "and it alone, in this respect." Nothing whatever is said in the bond about paying third parties for material or anything else. It was made to indemnify the defendant railroad company and none other. We cannot extend the liability of defendant by construction. On the contrary, the obligation of a surety, which is the obligation of defendant, must be strictly construed, and it cannot be held under the terms of its undertaking by implication or construction. *City of Sterling v. Wolf*, 163 Ill. 467.

The judgment of the Municipal Court is affirmed.

Affirmed.

**Bradford & Company, Inc., Appellee, v. United States
Tent & Awning Company, Appellant.**

Gen. No. 21,964. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 10, 1916.

Statement of the Case.

Action by Bradford & Company, Inc., plaintiff, against United States Tent & Awning Company, defendant.

The affidavit of meritorious defense was on motion of plaintiff stricken from the files, and a judgment, as in cases of default (the damages being assessed by a jury under the instructions of the trial judge), entered in favor of plaintiff for \$3,508.03, and defendant appeals.

Plaintiff contended that the contract was one of sale, and defendant that it was a consignment contract, and that under the contract it acted as plaintiff's factor and that the title to the goods remained in plaintiff.

The material parts of the contract were that defendant was to handle the entire line of pillow tops manufactured by plaintiff "on a consignment basis" subject to a five per cent. return. Prices were stated which were to be paid by defendant to plaintiff as soon as money was received by defendant from purchasers; that "a full settlement is to be made November 1, 1914, for all stock on hand or in transit in excess of five per cent. of the total shipments, said five per cent. to be subject to" (plaintiff's) "disposition and to be in first class merchantable condition as originally shipped." Defendant bound itself not to sell the goods for less than fifteen cents advance on the prices fixed. It was

Bradford & Co., Inc. v. U. S. Tent & Awning Co., 198 Ill. App. 505.

not disputed under this contract that defendant received from plaintiff pillow tops to the value of \$6,207.69, or that defendant was entitled to a credit of \$2,689.66, which included goods returned of the value of \$324.50.

LITZINGER, MCGURN & REID, for appellant.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 221*—*when assessment by jury unnecessary.* Where defendant's affidavit of meritorious defense is stricken from the files on plaintiff's motion, assessment of damages by the jury is not necessary unless requested, the sworn statement of claim being sufficient from which to make such assessment.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what procedure proper where affidavit of defense stricken.* Where defendant's affidavit of meritorious defense is stricken from the files on plaintiff's motion, the cause should proceed on the assessment of damages as in cases of default, defendant not being entitled to read its affidavit of defense to the jury but only to cross-examine plaintiff's witnesses in diminution of damages.

3. MUNICIPAL COURT OF CHICAGO, § 13*—*what effect of striking affidavit of defense.* Under the practice in the Municipal Court of Chicago, a motion to strike the affidavit of defense is tantamount to a demurrer to defendant's pleading and, when sustained, so far puts defendant out of court that he can only cross-examine witnesses for the purpose of minimizing damages.

4. CONTRACTS, § 171*—*what rule of construction.* In construing a contract, all of its parts must be considered.

5. CONTRACTS, § 181*—*when intent of parties controlling.* The designation which the parties to a contract give to it are not binding upon the court in construing it, but its character and the rights of the parties may be determined by ascertaining the intention of the parties from all the language used in the contract.

6. SALES, § 3*—*when contract one of sale and not consignment contract.* In an action on a contract, terms of contract examined and contract held to be one of sale and not a consignment contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Anton Papszycki, Defendant in Error, v. John Gurka,
Plaintiff in Error.**

Gen. No. 19,494. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action by Anton Papszycki, plaintiff, against John Gurka, defendant, in the Superior Court of Cook county, to recover damages for being bitten by defendant's dog. To reverse a judgment for plaintiff for eight hundred and fifty dollars, defendant prosecutes this writ of error.

W. G. ANDERSON and E. H. WRIGHT, for plaintiff in error.

CHYTRAUS, HEALY & FROST, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. ANIMALS, § 14*—*when persons not bound to exercise care to avoid being bitten by domestic animals.* Persons are not bound to exercise care to avoid being injured by domestic animals not naturally dangerous without notice of the vicious tendencies of the particular animal.

2. ANIMALS, § 39*—*when plaintiff need not allege and prove due care to avoid injury from animal.* In an action to recover damages for being bitten by a dog, it is not necessary for plaintiff to aver and prove due care and caution for his own protection, such facts being matter of defense.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherwood v. Smolt, 198 Ill. App. 508.

3. APPEAL AND ERROR, § 1313*—*when presumed that case tried on regular call of calendar.* Where nothing to the contrary appears in the record, it will be presumed that a case is tried on the regular call of the calendar.

4. DAMAGES, § 228*—*when notice to defendant after default not prerequisite to holding inquest to assess damages.* Where a default is entered in an action tried on the regular call of the calendar, notice to the defendant after such default is not necessary to enable the court to hold an inquest for assessing damages.

Marc Sherwood, Defendant in Error, v. F. O. Smolt et al., M. W. Sheafe, Plaintiff in Error.

Gen. No. 20,423. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916. Rehearing denied April 26, 1916.

Statement of the Case.

Bill in chancery by Marc Sherwood, complainant, against F. O. Smolt, M. W. Sheafe, Ulric King, the American-Mexico Mining & Developing Company, a corporation, G. V. Penwell, J. E. Morris and Fred Matters, defendants, to declare and enforce an express trust imposed on certain personal property to secure the payment of a loan made to the defendant corporation, which fund came into the hands of defendants Sheafe and Smolt. To reverse a decree that defendant Sheafe pay complainant the sum of \$7,725, such defendant prosecutes this writ of error.

JOHN F. HIGGINS, for plaintiff in error.

CHARLES HUDSON, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherwood v. Smolt, 198 Ill. App. 508.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1270***—*when presumed that there is sufficient evidence to sustain findings of facts in decree.* Where the record in the Appellate Court in a suit in equity contains no certificate of evidence, it will be presumed that there was sufficient evidence to sustain the finding of facts recited in the decree, and the only question on appeal in such case is whether or not there is a sufficient finding of facts to sustain the decree.

2. **EQUITY, § 515***—*when finding of facts sufficient to sustain decree.* On a bill in equity to declare and enforce against certain personal property of a mining corporation an express trust for money loaned to it by its president for smelting ore, it being agreed that the proceeds of the ore should be held by the company as a trust fund for the payment of the loan, where a decree in favor of the complainant made a finding of the following facts as its basis: That at the time of making the agreement defendants were in direct control of the affairs of the mine, and had charge of the output and reduction of the ore; that defendants represented that it was for the interest of the corporation to smelt the ore already mined, and requested the loan, which plaintiff and others accordingly made; that on completion of the smelting operation complainant applied to the officers of the corporation for an accounting and payment, which defendants from time to time promised to make, putting complainant off with promises and representations, up to and including the time of the decree, *held* that the finding warranted the reasonable inference that the court also found as a fact that the act of defendants in making the agreement was either authorized or ratified by the company.

3. **EQUITY, § 515***—*when decree for payment of money by officers of corporation warranted by finding.* In a suit in equity to declare and enforce an express trust against certain personal property for money loaned to a mining corporation on an agreement made by its officers that the proceeds of certain sales of smelted ore should be held as a trust fund for the payment of the debt to which bill such officers were made parties, a decree that such officers pay a sum of money to complainant is warranted by a finding that the certain sums were collected from the sale of the ore by a defendant, who remitted it to another defendant, and that the two dissipated such fund, or a large portion of it, such fund coming into the hands of such defendants as a trust fund for plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherwood v. Smolt, 198 Ill. App. 508.

4. APPEAL AND ERROR, § 734*—*when affidavits may not be considered on review of decrees on petition to set aside decree in equity.* Affidavits attached to a verified petition to set aside a decree in equity, or affidavits filed after the filing of such petition, cannot be considered on review unless it appears from the record that such affidavits were considered by the court below in passing on the motion to vacate the decree.

5. APPEAL AND ERROR, § 734*—*when record must contain affidavits in support of motion to vacate decree in equity.* The fact as to whether the court below, in passing upon a motion to vacate a decree in a suit in equity, considered affidavits filed in support of such motion, or attached to the petition, can only be made to appear by making such affidavits part of the record certified to by the judge who heard the cause.

6. APPEAL AND ERROR, § 1268*—*when action of court in overruling motion to vacate decree presumed correct.* On review of a decree in a suit in equity, where there is no certificate to show that any affidavits were considered by the court in overruling a motion to vacate the decree, such action must be presumed to be correct.

7. APPEAL AND ERROR, § 855*—*what certificate of evidence must contain.* Affidavits filed in support of or attached to a verified petition for the vacation of a decree in equity are not part of the record on review unless preserved by a certificate of evidence.

8. APPEAL AND ERROR, § 855*—*what certificate of evidence must contain.* A verified petition for the vacation of a decree in equity is in the nature of an affidavit, and is not part of the record on review unless preserved in the certificate of evidence signed by the trial court.

9. EQUITY, § 56*—*when objection by defendant that plea of co-defendant not disposed of without merit.* In a bill to enforce an express trust, where there were several defendants, one of whom rested on a plea to the jurisdiction without answering, an objection by another defendant that the plea was not disposed of *held* without merit.

10. EQUITY, § 399*—*when objection of defendant that codefendant not served without merit.* In a bill to enforce an express trust, where there were several defendants, an objection by one of them that another was not served *held* without merit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James V. Walsh, Defendant in Error, v. New England Casualty Company, Plaintiff in Error.

Gen. No. 21,035. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH R. STEWART, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed with finding of facts. Opinion filed April 12, 1916.

Statement of the Case.

Action by James V. Walsh, plaintiff, against the New England Casualty Company, a corporation, defendant, in the Municipal Court of Chicago, to recover salary. To reverse a judgment for plaintiff for fifty-four dollars, defendant prosecutes this writ of error.

RYAN & CONDON, for plaintiff in error; IRWIN L. LIVINGSTON, of counsel.

No appearance for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 84*—*when evidence insufficient to prove contract of employment from month to month.* In an action to recover salary based on the theory that the hiring was from month to month, entitling plaintiff to a month's notice of intention to discharge, evidence examined and held not sufficient to prove a contract of employment from month to month.

2. MASTER AND SERVANT, § 84*—*when evidence insufficient to show that servant was not discharged for good cause.* In an action to recover salary, evidence examined and held insufficient to show that plaintiff was not discharged for good cause.

3. MASTER AND SERVANT, § 84*—*when evidence sufficient to show discharge of servant on specified date.* In an action for salary,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bartholomae & R. B. & M. Co. v. Chicago Rys. Co., 198 Ill. App. 512.

where the evidence was conflicting as to whether plaintiff was discharged on July 31st or August 1, 1914, evidence examined and *held* to show that the discharge took place on July 31st.

4. MASTER AND SERVANT, § 84*—*when evidence insufficient to sustain verdict*. In an action to recover salary, where there was no contract for hiring by the month and where the evidence showed that plaintiff was discharged for good cause, a finding for plaintiff for the amount of a month's wages after discharge less what plaintiff earned in that time *held* erroneous.

Bartholomae & Roesing Brewing and Malting Company, Defendant in Error, v. Chicago Railways Company and Langsman Teaming Company. Langsman Teaming Company, Plaintiff in Error.

Gen. No. 21,058. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JABECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action of tort by Bartholomae & Roesing Brewing & Malting Company, a corporation, plaintiff, against the Chicago Railways Company, a corporation, and Langsman Teaming Company, a corporation, defendants, in the Municipal Court of Chicago, to recover for damages to plaintiff's beer wagon as a result of a collision between another wagon and a street car. To reverse a judgment for plaintiff for \$78.60, defendant Langsman Teaming Company prosecutes this writ of error.

The case was tried by the court without a jury, which dismissed the action as against defendant Chicago Railways Company. It appeared that the cause of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bartholomae & R. B. & M. Co. v. Chicago Rys. Co., 198 Ill. App. 512.

accident was that defendant's wagon, which was standing in rear of plaintiff's wagon, in front of a saloon, attempted to pull out and go round plaintiff's wagon, and in so doing was struck by a street car in such fashion as to throw it against plaintiff's wagon, the impact knocking off certain barrels of beer, with which plaintiff's wagon was loaded, breaking the barrels and causing the beer to leak out.

MEEK & McDONALD, for plaintiff in error.

WINSTON, PAYNE, STRAWN & SHAW, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **TORTS, § 30***—*when evidence sufficient to sustain finding of negligence of joint tort feisor.* In an action against joint defendants to recover for negligent damage to plaintiff's beer wagon and beer, where plaintiff had a finding against one defendant, the court dismissing the action as to the other, the plaintiff need only show, to hold the finding, that some negligent act of the defendant found guilty contributed to the injury.

2. **TORTS, § 30***—*when evidence sufficient to sustain finding that negligence of one defendant contributed to injury.* In an action to recover for negligent injury to plaintiff's beer wagon and beer by a collision between another wagon and a street car, in such fashion as to cause such other wagon to be thrown against plaintiff's wagon, damaging it, and causing certain barrels of beer to fall off and be broken, the beer flowing out, evidence held sufficient to warrant a finding that negligence on the part of the defendant found guilty contributed to the accident.

3. **TORTS, § 23***—*when plaintiff may recover against one or all of joint tort feisors.* In an action for negligence where there are joint tort feisors, plaintiff may recover against one or all of such tort feisors.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Warder v. Lake, 198 Ill. App. 514.

4. **TORTS, § 34***—*when joint tortfeasor found guilty estopped to claim that other defendant should have been found guilty.* In an action for negligence where there are two defendants, and the action is tried without a jury, a defendant found guilty is estopped to claim that the court may have erred in not also finding the other defendant guilty, the negligence of such other defendant not excusing negligence on the part of the defendant found guilty.

**Benton Warder, Defendant in Error, v. W. J. Lake,
Plaintiff in Error.**

Gen. No. 21,116. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action by Benton Warder, plaintiff, against W. J. Lake, defendant, in the Municipal Court of Chicago, to recover a balance alleged to be due on an account for provisions. To reverse a judgment for plaintiff for \$71.53, defendant prosecutes this writ of error.

DONALD GROVER, for plaintiff in error.

M. W. CORNELL, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **TRIAL, § 305***—*what constitutes sufficient finding that defendant made unconditional promise to pay debt.* In an action to recover the balance due on an account, where it appeared that de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Matthes v. Matthes, 198 Ill. App. 515.

fendant had been discharged in bankruptcy since the cause of action accrued, but had since the discharge made a payment on account of the debt, a finding and judgment for plaintiff must be taken as a finding that defendant made an unconditional promise to pay the debt at the time of the payment in question.

2. **BANKRUPTCY, § 85***—*when evidence sufficient to sustain finding for plaintiff in action on discharged account.* In an action to recover the balance due on an account, where it appeared that since the cause of action accrued defendant had been discharged in bankruptcy, but had since the discharge made a payment on account of the debt, a finding for plaintiff held not clearly and manifestly against the weight of the evidence.

**Herbert A. Matthes by Margaret Matthes, Appellant,
v. Florence Matthes, Appellee.**

Gen. No. 21,265.

1. **MARRIAGE, § 12***—*when justices of the peace have power to perform marriages.* Section 60 of the Municipal Court Act (J. & A. ¶ 3377), abolishing the office of justice of the peace in the City of Chicago, applies only to the judicial acts of such justices, and does not affect the power granted to such justices by section 4 of the Marriage Act (J. & A. ¶ 7348) to perform marriages.

2. **MARRIAGE, § 12***—*what is nature of power of judicial officers to perform marriages.* Justices of the peace and other judicial officers empowered by section 4 of the Marriage Act (J. & A. ¶ 7348) to perform marriages are so authorized merely as persons holding certain offices and not by reason of the judicial powers incident to their offices.

3. **MARRIAGE, § 21***—*when marriage presumed valid.* In actions involving the validity of a marriage, the public is to be safeguarded by resolving all doubts in favor of the validity of the marriage.

4. **MARRIAGE, § 8***—*when marriage of minors without consent of parents valid.* Section 3 of the Marriage Act (J. & A. ¶ 7347), providing that a male minor of the age of eighteen and upwards and a female minor of the age of sixteen and upwards may marry with the consent of their parents or guardians given in a prescribed manner, is merely directory, there being no words or prohibition

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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or nullification, and a want of such consent will not invalidate the marriage.

5. INFANTS, § 20*—*what is reason for rule upholding validity of contracts of marriage of minors above age of consent.* The rule that marriages of minors above the age of consent are binding contracts is an exception to the ordinary rule regarding the contracts of minors, the reason being that the body politic is directly interested in the stability of the marriage relation.

6. MARRIAGE—*what is effect of statutes designating age at which persons may contract marriage.* Statutes designating the age at which persons may contract marriage are to be regarded as raising the age of consent as established by the common law.

7. MARRIAGE—*what was effect of statute raising age of consent for marriage.* Section 3 of the Marriage Act (J. & A. ¶ 7347), providing that a male minor of the age of eighteen and upwards and a female minor of the age of sixteen and upwards may marry under certain conditions was intended by the legislature to raise the age of consent or discretion from fourteen and twelve years respectively, as established by the common law, to eighteen and sixteen years respectively.

8. MARRIAGE, § 29*—*when marriage between minors below age of consent may be annulled.* A marriage between minors under the ages established by section 3 of the Marriage Act (J. & A. ¶ 7347) may be annulled by either party before arriving at the age of consent.

9. MARRIAGE, § 16*—*how marriage between persons under age of consent rendered valid.* A marriage between persons under the ages prescribed by section 3 of the Marriage Act (J. & A. ¶ 7347) is valid if after arriving at the age of consent the parties continue the marriage relation, they being deemed in such case to have ratified the marriage.

10. MARRIAGE, § 8*—*when failure to file consent of parent to marriage of minor not conclusive as to age of minor.* In a suit to annul a marriage on the ground, *inter alia*, of the nonage of the husband, the fact that the consent of complainant's parent was not filed as required by section 3 of the Marriage Act (J. & A. ¶ 7347) is not conclusive as to the age of the complainant at the time of the marriage, the statute being merely directory.

11. APPEAL AND ERROR, § 1271*—*when presumed that chancellor considered questions of fact and law and determined controverted questions of law in favor of complainant.* In a suit to annul a marriage on the ground, *inter alia*, of the nonage of complainant at the time of the marriage, where the bill was dismissed for want of equity, it must be presumed, in the absence of anything in the record to show the contrary, that the chancellor, in so dismissing

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the bill, considered the question as one of fact as well as of law, and that all controverted questions of law were determined in favor of the defendant.

12. **MARRIAGE, § 26***—*when evidence to rebut presumption of validity of marriage sufficient.* The presumption which arises in the absence of evidence to the contrary that a marriage is regular and valid may be rebutted, but the rebutting evidence must be strong, distinct, satisfactory and conclusive.

13. **MARRIAGE, § 26***—*when evidence sufficient to sustain finding in favor of validity of marriage.* A finding in favor of the validity of a marriage will be sustained if there is any evidence to support it.

14. **MARRIAGE, § 29***—*when marriage relation not dissolved.* Since the standard of public morals is in large measure affected by the degree of vigilance exercised to preserve the sanctity of marriage, the courts view with a jealous eye any attempt to tear asunder the bonds of matrimony.

15. **EVIDENCE, § 475***—*when chancellor may consider demeanor of witnesses in determining preponderance of evidence.* A chancellor hearing the evidence in a suit to annul a marriage on the ground of the nonage of one of the parties has the right, where the evidence is conflicting, to take into consideration the appearance and demeanor of the witnesses on the stand in determining where the preponderance lies.

16. **APPEAL AND ERROR, § 1395***—*when finding of chancellor not disturbed on appeal.* A court of review will not disturb the finding of a chancellor who sees the witnesses and hears them testify unless it can be seen from the whole testimony that the finding is clearly and manifestly against the weight of the evidence.

17. **MARRIAGE, § 29***—*when finding for defendant in suit to annul marriage sustained by evidence.* In a suit to annul a marriage on the ground of the nonage of one of the parties at the time of the marriage, and on other grounds, where the evidence was conflicting, a finding for the defendant held not clearly and manifestly against the weight of the evidence.

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916. Rehearing denied April 26, 1916.

GEORGE C. GUTHRIE, for appellant; HARRY F. BREWER, of counsel.

A. H. MARSHALL, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

This is an appeal from a decree dismissing for want of equity the bill of complainant (appellant) to annul his marriage with the defendant (appellee).

The amended bill of complaint (which was filed November 6, 1913) alleged that a marriage ceremony was performed between the parties hereto on March 20, 1913; that at the time of said marriage complainant was under the age of eighteen years; that under the statute of our State he was therefore not capable of consenting to or entering into a marriage contract. The bill further alleged that complainant did not enter into said marriage with voluntary consent but was compelled to do so by force and under duress, and set forth facts in support of such allegation; and finally, that the marriage ceremony was performed by a justice of the peace residing in Oak Park, Illinois, whose jurisdiction was limited to Cook county outside of the confines of the City of Chicago; that by reason of the Municipal Court Act said justice had no authority to perform a marriage ceremony within the limits of Chicago; for all of which reasons complainant prayed that said marriage be annulled.

Defendant in her answer neither admitted nor denied complainant's age as alleged in the bill, but stated on information and belief that he was older than eighteen years at the time the ceremony was performed, having been so informed by the complainant himself; that immediately following said marriage, complainant and defendant began living together as husband and wife, and continued to do so until about May 23, 1913; that complainant appeared in person before the county clerk of Cook county on March 20, 1913, and applied for a marriage license for himself and defendant, and that he made affidavit at that time that he was twenty-one years old. The answer further denied that

complainant was entitled to have the said marriage annulled.

The first point raised by complainant is that a justice of the peace cannot perform a valid marriage ceremony in the City of Chicago, because the office of justice of the peace has been abolished in the City of Chicago. In this we cannot concur.

Section 4 of our Marriage Act, Rev. St., ch. 89 (J. & A. ¶ 7348), provides that marriages may be celebrated either by a judge of any court of record, by a justice of the peace, etc. Section 60 of our Municipal Court Act, Rev. St., ch. 37 (J. & A. ¶ 3377), abolishes the office of justice of the peace in the City of Chicago, but in our opinion this provision has reference only to judicial acts of a justice of the peace. Such persons are authorized to perform marriage ceremonies not by reason of the judicial powers incident to their office but merely as persons holding certain positions. The solemnization of the marriage in question was an act with which the Municipal Court Act has no concern.

Our attention has been directed to *Bashaw v. State*, 1 Yerg. (Tenn.) 177, as being opposed to this view. In that case the marriage was solemnized in one county by a justice of the peace whose jurisdiction was in another county. The validity of the marriage was assailed on the ground that the officiating justice was acting outside his jurisdiction, and the court held the marriage invalid on the ground that a justice of the peace had no jurisdiction whatever outside his county. The court in its opinion made no distinction between judicial and ministerial acts. However, this decision is not in accord with the principle that now appertains as to safeguarding the public by resolving all questions of doubt in favor of the validity of a marriage. (*Reifschneider v. Reifschneider*, 241 Ill. 92, 97; *Jones v. Gilbert*, 135 Ill. 27.)

The main contention of complainant, however, is that the marriage is void because at the time it was

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entered into he was under the age of consent according to the provisions of section 3 of our Marriage Act (J. & A. ¶ 7347) *supra*, which provides as follows:

“Male persons of the age of 21 years and upwards, and female persons of the age of 18 years and upwards, may contract and be joined in marriage: *Provided*, that a male person of eighteen years of age and upwards or a female person sixteen (16) years of age and upwards may contract a legal marriage if the parent or guardian of such person shall appear before the county clerk in the county where such minor person resides, and shall make affidavit that he or she is the parent or guardian of said minor and give consent to the marriage.”

Complainant maintains that the foregoing section raises the age of consent, from fourteen in males and twelve in females, as at common law, to eighteen and sixteen years respectively; that the age of consent having been raised by act of Legislature in our State, any marriage entered into by a male person under eighteen or a female person under sixteen years of age is void or voidable, and can therefore be annulled or affirmed by either party upon attaining the legal age of consent.

Defendant contends, however, that inasmuch as the section relied upon by counsel for complainant does not contain any direct prohibition or any act of nullification, it is merely directory, and that the common-law age of consent is not thereby repealed, hence a person having attained the common-law age of consent may enter into a valid marriage.

The precise question as raised by these contentions has never been passed on in this State. In *Reifschneider v. Reifschneider*, *supra*, the facts differ from those here before us. In that case both parties to the marriage were more than eighteen years of age but the consent of the parents was lacking. The court held that in the absence of express words of nullification or prohibition in our statute, the language with respect to the consent of the parents was merely directory and

did not render the marriage invalid. This principle of law has been adhered to by the courts in other States where similar statutes obtain; and in connection with these decisions must be borne in mind the fact that the parties there involved had at least reached the age of consent. In the case at bar, however, the contention of the complainant is based upon the presumption that he was less than eighteen years of age at the time the marriage in question was entered into. The holding valid of a marriage contract entered into by minors above the common-law age of consent is an exception to the ordinary rule with reference to contracts of minors. There can be no question that this exception exists because of the fact that a marriage contract differs from all other contracts in its far-reaching consequences to the body politic which is directly interested in and is never indifferent to the importance to the State of maintaining the stability of the marriage contract. Our Legislature, in passing the provision with reference to the age at which persons may contract marriage and in designating eighteen as the age of males and sixteen years as the age of females, was but following the general trend in that direction. The reason therefor is well set forth in *Shafher v. State*, 20 Ohio 1. In that case the question arose whether or not the age of consent had been raised by such statute, and the court said, p. 4:

“Although the marriage relation has its foundation in nature, and is indispensable to the moral improvement and happiness of mankind, a great variety is found to exist in the municipal regulations of civilized states as to the age at which it may be lawfully entered into. Nature has fixed no precise period, and each state must for itself, by fixed and reasonable rules, regulate the matter with regard to its own peculiar circumstances. The common law, as is well known, borrowed from the Roman law, fixed the age at fourteen in males and twelve in females. The code Napoleon fixed it at eighteen in males and fifteen in females.

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In some of the states of this Union the common law rule prevails, and in others the matter is regulated by statute. In Massachusetts and Illinois it is fixed at seventeen in males and fourteen in females; (as it then existed in Illinois) Michigan and Indiana follow the provisions of our own law. This diversity of regulation is not in all cases accidental. Nature herself in many cases demands such variation. An age that would be right and proper in Spain and Italy would not be adapted to Norway and Sweden. A state of society and a system of policy that makes marriage in many cases a convenient means of controlling estates and confining property in particular channels, as in Great Britain, is best subserved by allowing marriages at a period of life when parental influence and authority is not likely to be overcome by the strong current of affection and independence incident to maturer years. But such a regulation would be poorly adapted to a state of society like our own, where no such policy is to be promoted, where fidelity to the marriage vow has all the sanctity of a religious sentiment, and where all experience has shown that the blessings of the marriage relation can only be realized when entered into with the utmost freedom of choice, and between persons of matured judgment and discretion."

The opinion in *People v. Slack*, 15 Mich. 192, is also illuminating on this point. In that case Mr. Justice Cooley, speaking for the court, said, p. 197:

"The age of legal consent is fixed by our statute at eighteen in males and sixteen in females (citing statute); and it is provided by another section that, 'In case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such non-age, and not cohabit together afterwards, * * * the marriage shall be deemed void without any decree of divorce or other legal process.' (citing statute). It was suggested, rather than urged, on the argument, that the age of legal consent intended by the section quoted, was that of the common law, which, in the case of females, would be twelve years; but we think there is no foundation for this suggestion. When one part of the statute fixes

the age of consent, we should do violence to the plain intent of the legislature if we should hold that the 'age of legal consent' mentioned in any other part of the same statute meant anything else than the legal age thus fixed. The common law rule having been abrogated in this state, there is nothing to which we can refer this phraseology but the rule which the statute has thus substituted."

The court therefore clearly held that the words "age of legal consent" must be held to mean the age of eighteen and sixteen as fixed by the statute.

In numerous other decisions wherein similar statutes were construed, the courts adopted the reasoning in the aforesaid cases, holding that where a statute designates the age at which persons may contract marriage, even in the absence of words of prohibition or nullification, such provision must be regarded as raising the age of consent as established by the common law. *State v. Lowell*, 78 Minn. 166; *Beggs v. State*, 55 Ala. 108; *Eliot v. Eliot*, 77 Wis. 634, 46 N. W. 806; *Willits v. Willits*, 76 Neb. 228, 107 N. W. 379; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Hunt v. Hunt*, 23 Okla. 490, 22 L. R. A. (N. S.) 1202, 100 Pac. 541. The leading case to the contrary, and relied upon by defendant, is that of *Goodwin v. Thompson*, 2 (Greene) Iowa 329. However, we are in accord with the reasoning employed in the foregoing cases, and as they represent the weight of authority, we are of the opinion that when our Legislature designated who may contract marriage it was their intention to raise the age of discretion or consent from fourteen and twelve years, as established by the common law, to that of eighteen and sixteen years respectively; therefore, if a marriage is performed between people under such age it may be annulled by either party before arriving at the age of consent. Necessarily, if after arriving at the age of consent the parties should continue the marriage relation, then they must be considered to have ratified same and the marriage thereby becomes valid and binding.

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In the case at bar, however, the question is not only one of law but also one of fact, viz., whether the evidence shows that complainant was under the age of eighteen years at the time he entered into the marriage. If the chancellor's decree of dismissal was based upon the finding that complainant was more than eighteen years of age and less than twenty-one at the time of entering into the marriage, then the holding in *Reifschneider v. Reifschneider*, *supra*, is decisive. The fact that the consent of complainant's parent was not filed with the county clerk, as provided for in our statute, is not controlling, because, as held in *Reifschneider v. Reifschneider*, *supra*, that provision, in the absence of prohibitory language or words of nullification, is merely directory. Had the court found that complainant was more than twenty-one years of age, the question necessarily would not have arisen.

In connection with the question of fact as to the actual age of the complainant was the further question whether or not he had really assented to the marriage, i. e., whether he entered into it as his free and voluntary act or as the result of coercion and duress.

In the absence of anything in the record to show the contrary, it must be presumed that the court, in dismissing the bill for want of equity, did not consider it a question only of law, but also one of fact, and that all controverted questions of fact were determined in favor of the defendant. The law is well established that in the absence of evidence to the contrary, an actual marriage is presumed regular and valid, and though such presumption may be rebutted, yet evidence of invalidating facts must be strong, distinct, satisfactory and conclusive; and if there is any evidence to support a finding in favor of the marriage it will be sustained. (26 Cyc. 897, and cases there cited.) In following this rule of law, the courts no doubt were actuated by the fact that the marriage relation had a direct bearing upon the welfare of the community, es-

pecially with reference to the protection of any children born of such marriage, as in the case at bar. The standard of public morals is, in a great measure, affected by the degree of vigilance exercised to preserve the sanctity of this sacred institution, and for this reason alone our courts have adopted the salutary policy of viewing with a jealous eye any attempt to tear asunder the bonds of matrimony.

A marriage had been performed and the parties thereto had entered upon the marital relation and a child was afterwards born. On the questions whether complainant was of nonage or whether the marriage was procured by duress or fraud, the evidence was conflicting. The chancellor found for the defendant. He saw and heard the witnesses testify and was in a more advantageous position than we now are, to determine where the preponderance lay. He had the right to take into consideration the appearance and demeanor of the witnesses while on the stand. We should not be warranted in disturbing his finding unless it is clearly and manifestly against the weight of the evidence. In *Phelan v. Hyland*, 197 Ill. 395, the court said on this point, p. 397:

“The rule has been often announced by this court that where the chancellor sees the witnesses and hears them testify, we will not disturb his finding and decree unless we can see, from the whole testimony, that it is manifestly against the weight of the evidence.”

To the same effect are *Delaney v. Delaney*, 175 Ill. 187, and *Burgett v. Osborne*, 172 Ill. 227. In *Calvert v. Carpenter*, 96 Ill. 63, Mr. Justice Mulkey, in delivering the opinion of the court, said, p. 67:

“It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual

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experience, that more or less of what the witness actually did say is always lost in the process of transcription. But the main difficulty does not lie here. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things can not be transcribed upon the record, and hence they can never be considered by this court."

Having in mind the views so clearly expressed in the foregoing decisions, and after a careful examination of the record, we cannot say that the finding of the court on the questions of fact in issue is clearly and manifestly against the weight of the evidence. The decree must therefore be affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Seymour R. Simpson, Plaintiff in Error.

Gen. No. 21,674.

1. CRIMINAL LAW, § 423*—*when objections to argument of State's Attorney not considered on review.* Objections to the argument of the State's Attorney in a criminal case cannot be considered on review where such argument does not appear in the record.

2. CONSPIRACY, § 56*—*when evidence sufficient to sustain verdict in criminal prosecution.* In a prosecution for conspiracy to defraud by means of the confidence game, evidence examined and a verdict of guilty held not manifestly against the weight of the evidence.

3. CRIMINAL LAW, § 570*—*when refusal to instruct jury to find defendant not guilty on quashed counts harmless error.* Where an indictment contains four counts, one of which is quashed and another withdrawn from the jury at the close of all the evidence, it is not reversible error to refuse to instruct the jury to find defendant not guilty on the counts quashed and withdrawn where the court instructs the jury that they can only find defendant guilty on two counts, and he is found guilty only on one of such counts, defendant not being harmed by the action of the court complained of.

4. CONSPIRACY, § 37*—*when counts in indictment for conspiracy not merged.* A count in an indictment charging conspiracy to commit an offense is not merged with another count charging the commission of the offense, the two counts charging other and different offenses.

5. CONSPIRACY, § 54*—*when exclusion of evidence on cross-examination harmless error.* In a prosecution for conspiracy, the action of the court in excluding a question put to a witness who had turned State's evidence as to whether he expected a lighter sentence as a result of so doing, although erroneous, is not reversible error as unduly restricting cross-examination, where the court permitted the witness to answer questions as to the witness' expectation of going free and as to whether any one in the State's Attorney's office had told him it would go lighter with him as a result of his action, and where the jury could not have found otherwise under the evidence, the error in such case being harmless.

6. CRIMINAL LAW, § 372*—*when judgment not in exact accord with verdict not void.* The fact that a judgment in a criminal case is not in exact accord with the verdict is merely an informality and does not render it void, where the verdict is in accord with the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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count under which defendant was convicted and where the punishment fixed by the jury and the sentence imposed are in accordance with the statute for the crime of which defendant was convicted.

Error to the Criminal Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed April 12, 1916.

STEDMAN & SOELKE, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment whereby plaintiff in error (defendant below) was adjudged guilty of the crime of obtaining money by means of the confidence game and required to pay a fine of \$1,000 and costs. This judgment was rendered upon a verdict of the jury finding defendant guilty of the crime of conspiracy to obtain money by means of the confidence game, the punishment being fixed by the jury at the aforesaid fine.

The indictment contained four counts: The first charged the crime of extortion; the second, conspiracy to obtain money under false pretenses; the third charged conspiracy to obtain money by means of the confidence game; the fourth, the obtaining of money by means of the confidence game. The first count was quashed, and, with the fourth count, was withdrawn by the court from the consideration of the jury, at the close of all the evidence. One R. H. Hickman was jointly indicted with defendant but never arrested or tried. The subject-matter of each count in the indictment was the obtaining unlawfully, by Hickman and defendant, of the sum of \$7 from one Nicholas Gann, a peddler.

The evidence on behalf of the People showed that one Nicholas Gann was a licensed huckster, doing busi-

ness in the City of Chicago; that there were in force in the City of Chicago at the time in question certain ordinances concerning weights and measures which were required to be used by peddlers in making sales; that the enforcement of these ordinances was under the control of the city sealer and his deputies; that these deputies were provided with official badges or stars, and clothed with the power of arresting violators of the ordinances in question; that the said Gann, on the fifth day of October, 1914, was out on the streets of Chicago peddling potatoes from a wagon; that shortly after he had made a sale to a housekeeper, using a peck measure instead of a scale, for the purpose of determining weight, thereby violating the city ordinance, two men stepped up to his wagon, one of whom was Hickman, who was named as a joint defendant in the indictment, and one Oliver Ashe; that these men charged the said Gann with the violation of the city ordinance because he used a peck measure instead of a scale, and ordered Gann to drive to the police station; that he (Gann) suspected that these men were not authorized inspectors; that upon Ashe's showing his star, he was confirmed in that belief because the star exhibited was a bogus star, and not the official star then in use. The testimony further showed that he had been informed that there were bogus inspectors threatening peddlers with arrest in order to make a "shake-down"; that while Gann talked with Ashe, the latter told him that for \$15 he would let him go; that finally Ashe agreed to take \$7, which was all the money Gann then had; that Gann observed a detective near at hand while talking with Ashe; that he signaled to the detective to come up; that Hickman had, up to this time, been following behind, but fled when he saw the detective approach; that as the detective came up, Ashe was promptly placed under arrest, and Hickman made his escape. This testimony was given by Gann and corroborated by Ashe.

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Ernest Griffith, the detective who made the arrest, testified that the man with Ashe at the time he was arrested ran away; that he took Ashe to the station, searched him and took \$7 and the star away from him.

The evidence further showed that Ashe was indicted for obtaining money by use of the confidence game; that he plead not guilty to this charge; that subsequently Ashe made a confession implicating the defendant; that thereafter Ashe withdrew his plea of not guilty and entered a plea of guilty to the charge of petit larceny, upon which sentence was deferred and Ashe was released on his own recognizance.

The testimony further showed that defendant, who was a deputy inspector in the city sealer's office, had proposed to Hickman and Ashe that they pose as deputy city sealers for the purpose of making pretended arrests of violators of the city ordinance; that the said Hickman and Ashe agreed to act upon defendant's suggestion, and it was also agreed that whatever moneys were secured on "shake-downs" were to be divided equally among the three, i. e., defendant, Hickman and Ashe; that this arrangement was entered into at a place known as Moffett's; located at 686 North Clark street, which was a pool room, barber shop and cigar stand combined, where Hickman was employed, and a place frequented by the defendant; that defendant suggested that Hickman and Ashe obtain a book containing the correct weights and measures, to show that they were bona fide inspectors; that defendant furnished them with the star in question, and furthermore promised that if trouble ensued they would be taken care of.

The evidence further showed that Ashe and Hickman had, prior to the pretended arrest of Gann, made a "shake-down" on Irving Park boulevard which netted them \$10, which sum was divided equally among the three as per agreement.

Ashe further testified that after his arrest he went to see the defendant and was by him taken to the office

of Daniel Cruice, an attorney; and that the defendant there arranged with Mr. Cruice to defend Ashe, and paid Mr. Cruice a retainer.

There was additional testimony by Gann that he saw the defendant in West Pullman while on the streets, and again at his (Gann's) home, and that during one conversation defendant requested him to be careful as to his testimony and not say "anything bad" about him (the defendant), and in the second, defendant asked him not to go to court at all but to leave the city.

On behalf of the defendant, Mr. Cruice testified that he had not been retained by the defendant nor paid any money as a retaining fee, to appear on behalf of Ashe, and had not seen Ashe in the presence of the defendant, at his office. Defendant himself took the witness stand and denied categorically all of the testimony of Ashe. He did admit that when he was in the vicinity he called on Gann and asked him whether or not he knew anything against him, and that Gann replied that he did not know anything. He denied, however, that he had asked Gann not to say "anything bad" against him, and further, that he had asked him not to go to court or to leave town.

John J. Higgins testified that he saw defendant when he met Gann the first time; that he was present during the entire conversation and that he did not hear defendant request Gann not to say "anything bad" against either himself (defendant) or Ashe.

Upon this state of the record, defendant insists that the finding of the jury is contrary to the weight of the evidence, and, furthermore, that the jury were influenced in arriving at their verdict by the conduct of the State's Attorney in commenting upon the testimony of Cruice and also in reading a case to the jury to the effect that the Supreme Court did not favor attorneys taking the witness stand.

The argument of the State's Attorney complained

of is not in the record; moreover, the record is barren of any objection to such acts on the part of the State's Attorney, if they actually did take place, therefore we cannot consider defendant's reference thereto.

In their argument for a reversal, counsel rely upon the claim that the State depended entirely upon the uncorroborated testimony of Ashe, an accomplice. In urging this contention counsel, while recognizing that a conviction may be obtained upon the uncorroborated testimony of an accomplice, insist that the law does not look with favor upon such testimony; that such testimony is subject to grave suspicion and should be acted upon only with the utmost caution. Defendant argues that therefore the verdict, based, as he contends, on the uncorroborated testimony of Ashe, a self-confessed accomplice, cannot be upheld in the face of evidence by the defendant denying in every way the testimony of Ashe, and the contradiction of Ashe on matters "of the most vital materiality" by Mr. Cruice. In support of this argument, counsel comment upon the fact that Ashe had not only admitted his guilt in the case at bar, but had also admitted having been convicted for robbery theretofore; and the further fact that Ashe had a strong inducement to testify falsely because under the facts and circumstances in evidence, he had reason to believe that in return for his turning State's evidence, he would receive immunity from punishment. It is fair to presume that this argument was made not only to the jury but also to the court, in counsels' argument on their motion for a new trial, but apparently without avail, as the jury found the defendant guilty and the court overruled his motion for a new trial.

The jury and court, in arriving at their determination, while believing Mr. Cruice's testimony, may have taken into consideration the fact that Mr. Cruice testified that he had never known Ashe prior to the time he was retained to defend Ashe on the charge of operating a confidence game; that he did know the defendant and

had been retained to defend him on charges arising out of this transaction when before the trial board of the civil service commission, and from these facts may well have arrived at the conclusion that Ashe had been sent to Mr. Cruice by the defendant,—a conclusion that may well have had an important bearing in arriving at a determination as to the defendant's guilt. The jury and the court may also have taken into consideration the further fact that the defendant, in statements to Peter Zimmer, city sealer, and William F. Cluetts, a deputy inspector of weights and measures, had denied knowing Ashe, and that afterwards on the trial admitted he had known him for more than a year. In addition, there were other circumstances which the court and jury may have taken into consideration in arriving at their conclusion, viz., the fact that defendant, although his home was five or six miles distant from Moffett's place, was a frequent visitor there; that in that place Hickman had been employed, and that defendant had had previous business dealings with Hickman. Gann's testimony with reference to the defendant's visiting him and asking him not say "anything bad" against him in court, and on another occasion suggesting that he leave the city, were circumstances properly to be taken into consideration by the jury with reference to the defendant's testimony. We cannot, therefore, look with favor upon defendant's contention that the verdict must have been based entirely upon the uncorroborated testimony of an accomplice. From a careful examination of the facts and circumstances in evidence in this case, we are not only of the opinion that the verdict is not clearly and manifestly against the weight of the evidence, but that the jury were fully warranted in arriving at their conclusion.

Counsel argue that the court erred in not instructing the jury to find the defendant not guilty on the first and fourth counts of the indictment; that the action of the court in withdrawing these counts from the

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consideration of the jury was not a compliance with defendant's request, and that the court was without power to take such action. In such contention we cannot concur. The record shows that when the case was submitted to the jury they were told that they could find the defendant guilty on but two counts in the indictment. Defendant was found guilty on but one of these two counts. Therefore we cannot see wherein defendant was harmed by the action of the court.

Several other reasons are urged by defendant for a reversal of the judgment, which involve as a necessary promise that there was a merger of the third count with the fourth count in the indictment. These are argued under points three, four, five and six of defendant's brief. The third count charged a conspiracy to obtain money by means of the confidence game. The fourth count charged the obtaining of money by means of the confidence game. The crime charged in the third count is distinct and separate from that alleged in the fourth. Under the well-settled law in our State, there was no merger of the third and fourth counts in the indictment. This distinction is clearly set forth in *People v. Darr*, 255 Ill. 456, where a similar contention was made, and the court said, p. 462: "A conspiracy to commit a crime is one offense; the commission of the crime is another and different offense," and held that there was no merger. We therefore cannot concur in the argument advanced by defendant on the aforesaid four points.

With reference to defendant's contention that there is a fatal variance between the evidence and the allegations in the indictment, we are of the opinion that this is without merit, as is also his contention that the court erred in refusing to give to the jury instructions submitted by him as to the fourth count in the indictment, which the court withdrew from the consideration of the jury.

Defendant also contends that the court erred in un-

duly restricting the cross-examination of Ashe as to his motive in turning State's evidence. The record upon this point in the case is as follows:

“MR. SOELKE:

“Q. Do you expect to be allowed to go free in consideration of your testifying against Mr. Simpson?

A. No, sir.

“Q. Do you expect to have your punishment in this case made lighter than it otherwise would be, by reason of your testifying against Mr. Simpson, now and in payment therefor?”

The court sustained an objection to the latter question. Then came the following question:

“MR. SOELKE:

“Q. Now, has anyone connected with the state's attorney's office told you that if you would testify in this case against Mr. Simpson it would go lighter with you?

A. No, sir.”

Counsel, in support of their contention that the ruling of the court constituted reversible error, refer us to *Stevens v. People*, 215 Ill. 593. There is, however, a difference between that case and the case at bar. In that case the court allowed no questions to be answered by the witness as to his expectations. In the case at bar, the court did permit the question whether the witness expected to go free entirely in consideration of his testifying, which was answered in the negative. Moreover, there was the question whether the State's Attorney had told him that he would receive a lighter sentence, and this question was answered in the negative. Under these facts and circumstances, we do not think the case cited by counsel is applicable, as we do not think the cross-examination in the case at bar was unduly limited. While under the reasoning in *Stevens v. People*, *supra*, we think the court should have permitted the question to be answered, yet being of the opinion that under the facts and circumstances in evidence in the case at bar the verdict of the jury could not have been otherwise, even had the question been

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answered in the affirmative, such error must be considered harmless. (*People v. Cleminson*, 250 Ill. 135; *People v. Strosnider*, 264 Ill. 434.)

There is the further contention by the defendant, that the judgment does not conform to the verdict of the jury. The jury found the defendant guilty of conspiracy to obtain money by means of the confidence game, while the judgment entered thereon adjudged defendant guilty of the crime of obtaining money by means of the confidence game. The verdict was in accord with the count in the indictment on which defendant was found guilty; the punishment fixed by the jury was the one provided by statute for the crime of which he was found guilty. The sentence imposed was the payment of a fine of \$1,000, in accordance with the verdict of the jury. Therefore, the most that can be said is, that the judgment is informal. Such informality, however, does not render the judgment void. *People v. Murphy*, 188 Ill. 144.

Finding no reversible error, the judgment will be affirmed.

Affirmed.

The People of the State of Illinois ex rel. Hattie Zimmerman, Appellee, v. Arthur Rhoele, Appellant.

Gen. No. 21,910. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. ARTHUR J. GRAY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed and remanded. Opinion filed April 12, 1916.

Statement of the Case.

Bastardy proceeding by the People of the State of Illinois, on the relation of Hattie Zimmerman, against Arthur Rhoele, defendant, in the Municipal Court of Chicago, charging defendant with being the father of the bastard child of the relatrix. From a judgment of conviction, defendant appeals.

EMIL A. MEYER, for appellant.

MACLAY HOYNE, for appellee.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

BASTARDS, § 22*—*when evidence insufficient to sustain finding of defendant's guilt.* In a bastardy proceeding where there was evidence that relatrix met other men about the time when the child must have been begotten, if it was a full-term child when born, and the evidence was conflicting as to when the intercourse took place between relatrix and defendant, defendant testifying that such intercourse took place at a time which would make the child when born a seven months' child, and being corroborated in such testimony, evidence examined and finding of guilty *held* clearly and manifestly against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cohn et al. v. Malo, 198 Ill. App. 538.

Isidor Cohn and Herman Cohn, trading as Cohn Brothers Cigar Company, Plaintiffs in Error, v. Edward M. Malo et al., trading as Sesti & Ash, Defendants in Error.

Gen. No. 20,409.

1. GARNISHMENT, § 24*—*what assets garnishment process will reach.* Garnishment process will reach only such assets in the hands of the garnishee as can be reached by an action at law, and does not affect assets which are purely equitable.

2. GARNISHMENT—*when defense against nominal plaintiff not available against real party in interest.* In garnishment proceedings, a defense which is good against the nominal plaintiff alone, but which has no merit as between the real parties, cannot be availed of as against a beneficial owner in whose name the action is brought.

3. STATUTES, § 216*—*when construed in accordance with decisions of other States having similar statutes.* Where a statute, such as the Bulk Sales Act, is substantially the same as statutes in other States which have received a judicial construction in the States where adopted, it is to be assumed that the General Assembly, in passing the act intended that such act should receive the construction given it by the courts of such other States, unless such construction is inconsistent with the spirit and policy of our laws.

4. GARNISHMENT, § 24*—*when goods and chattels obtained by void bulk sale from debtor subject to garnishment.* Goods and chattels obtained by a sale from a debtor contrary to the provisions of the Bulk Sales Act, and therefore void as to the creditors of the vendor, may be reached by such creditors in garnishment proceedings.

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed April 12, 1916.

BLUM, WOLFSOHN & BLUM, for plaintiffs in error.

NASH & AHERN, for defendants in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Plaintiffs in error, hereinafter referred to as plaintiffs, brought an attachment suit against defendant in error Malo, hereinafter referred to as the defendant, and made defendants in error Fred Sesti and William Ash, copartners, trading as Sesti & Ash, parties thereto as garnishees. It appears that while the defendant was indebted to the plaintiffs in the sum of \$76.25, he sold his entire saloon business, including all fixtures and merchandise, for \$2,200 to the garnishees, who did not demand and receive of him a written statement under oath containing a list of his creditors, or send any notice to said creditors in accordance with the terms of the Bulk Sales Law. It appears that at the time of the service of the attachment writ and at the date of the trial, the garnishees had possession of the goods purchased. It was admitted that the defendant himself had no rights against the garnishees. Upon this showing the court discharged the garnishees, and it is to reverse that order the plaintiffs sued out this writ of error.

The act upon which the plaintiffs rely, entitled "An Act to Regulate the Sale or Transfer of Goods, Wares, Merchandise and Other Chattels in Bulk, and to Provide Certain Penalties in Connection Therewith," (Cal. Ill. St. Supp. 1916, §§ 1021-1 to 1021-81) went into operation July 1, 1913, and its constitutionality was sustained by our Supreme Court in *G. S. Johnson Co. v. Beloosky*, 263 Ill. 363. Under the provisions of this statute the failure of the vendee to comply with its terms rendered the sale of the property in question "fraudulent and void as against the creditors of said vendor." The court below, however, sustained the garnishees' contention that these goods could not be reached by garnishee process for the reason that so far as the garnishment proceedings are concerned, the action is one in which the plaintiffs, in effect, maintain

a suit against the garnishees in the name of the debtor for their own use, and that in consequence the plaintiffs can succeed against the garnishees only where the debtor could have maintained his action against them. It may be noted here that the earliest case in which the question of the proper procedure in garnishment proceedings was discussed, is *Stahl v. Webster*, 11 Ill. 511, in which Mr. Justice Trumbull, speaking for the court, stated that in cases of garnishment, "The proper practice would, therefore, seem to be, to enter the judgment against the garnishee, in favor of the defendant in the attachment, for the benefit of such attaching and judgment creditors as are entitled to share in its proceeds." He continued: "There is a peculiar fitness in entering the judgment in favor of the party with whom the debt was contracted, and to whom it is due; and if the judgment exceeds what is due the attaching and judgment creditors, the balance will be for his benefit."

As counsel for garnishees in defense have cited a number of Illinois cases in support of their contention that a plaintiff can proceed against a garnishee only where the defendant could have maintained a successful action against him, we wish briefly to refer to those cases.

In *Cariker v. Anderson*, 27 Ill. 358, the court said, p. 364:

"The object and design of the garnishee process is to subject the debt he may owe the absent or absconding debtor, or his property in the hands of the garnishee, to the payment of the plaintiff's debt. The garnishee, then, is the defendant to the suit, the law institutes in favor of his creditor, the absent debtor, and he is the plaintiff in that suit."

The court in that case reversed a judgment as the suit was brought by the creditor directly against one who should properly have been a garnishee.

In *Webster v. Steele*, 75 Ill. 544, an attempt was made to reach equitable claims of the debtor. The

court, in holding that such claims could not be reached by garnishment, said, p. 547:

“We are entirely satisfied with the construction heretofore given to this statute, that only legal indebtedness can be subjected to garnishment. Equitable indebtedness is not within the purview of the statute. This is plain from the fact, the proceedings authorized can only be had in the law courts, and which are not adapted to ascertaining and adjusting the rights of parties where only equitable interests are involved.

“Our conclusion is, this proceeding cannot be maintained against any of the garnishees, for they are not legally indebted to Webster, in whose name the suit is being prosecuted.”

The same conclusion was reached in *Richardson v. Lester*, 83 Ill. 55, which was an action to reach equitable assets. The court said, p. 56:

“We are not aware the execution creditors can assert any rights in regard to the property or the proceeds that Robinson could not. Indeed, the action is in the name of Richardson & Robinson, and if they could not recover in an action against defendants, it follows, as a matter of course, the garnisheeing creditors can not, for if they recover at all it must be in the name of the execution debtors.”

The garnishees in that case were lawfully in possession under a chattel mortgage of the property sought to be garnisheed, and the equitable interest of the mortgagors, if any, could not, of course, be reached at law.

In *Wilcus v. Kling*, 87 Ill. 107, Mr. Justice Breese, speaking for the court, said, p. 109:

“It is urged by appellants, that, the process of garnishment being a legal proceeding, given by statute, a party is only entitled to recover such indebtedness as could be recovered in an action of debt or *indebitatus assumpsit* in the name of the attachment or judgment debtor, against the garnishee, referring to *Webster et al. v. Steele et al.*, 75 Ill. 546. That case goes upon the ground the claim sued for must be a legal, not an equi-

table claim, and such an one as would sustain an action of debt or assumpsit, and this is doubtless the proper view.”

It will be seen that in all the foregoing cases the point actually decided was that the plaintiff could only succeed against the garnishee where the assets in his hands could be reached by an action at law, and that the statute did not intend to permit him to reach assets which were purely equitable. This is also, apparently, the ground of the decision in *Chatroop v. Borgard*, 40 Ill. App. 279.

In support of their claim that a judgment creditor cannot recover from the garnishee anything which a judgment debtor himself could not recover, garnishees cite *Hibernian Banking Ass'n v. Morrison*, 188 Ill. 279. The court in that case say, p. 281:

“The general rule is, that a judgment creditor garnisher cannot recover from a garnishee anything which the judgment debtor could not himself recover. Indeed, a garnishee proceeding based upon a judgment is a separate suit in the name of the judgment debtor for the use of the judgment creditor. The fact that the suit is for the benefit of a usee does not enlarge or change the right of the nominal plaintiff, as against the garnishee.”

The court, however, points out that the judgment debtor was engaged in litigating the question of his right to the property in question at the time this suit was brought, and continuing, says:

“Their relative and respective rights were therein presented for adjudication by petitions and pleadings. That court had jurisdiction of the parties and of the subject matter prior to the time plaintiff in error obtained its said judgment against said Blackalls. The rights and lien of plaintiff in error, if any it ever had or acquired by reason of its said judgment or garnishment proceedings, were obtained *lis pendens*.”

In these circumstances, of course, the plaintiff in

error could acquire no greater rights than his judgment debtor.

In *Siegel, Cooper & Co. v. Schueck*, 167 Ill. 522, upon which the garnishees also rely, it appeared that the claim sought to be garnisheed was not one owing from the garnishees to the judgment debtor firm, but to one of the partners alone, and was obviously one which could not be reached by a proceeding at law. The court points out that the debtor firm could not have brought an action against the garnishees, because they were not indebted to it, and therefore as this claim against the garnishees was not the property of the firm, it could not be reached in a garnishment proceeding brought by one of its creditors.

Is the case at bar governed by the cases cited? It is clear that upon the authority of those cases, the plaintiffs' rights in this garnishment proceeding must be worked out upon the theory of an action brought in the name of the judgment debtor against the garnishees. Upon that theory, and assuming this garnishment proceeding to be, in substance, an action brought in the name of the defendants against the garnishees, and for the use of the plaintiffs, can the action be sustained? At common law the beneficial owner of a chose in action or other property could not enforce his claim in a court of law, but later, there grew up the theory of the use plaintiff under which the beneficial owner was permitted to bring his action in the name of the legal owner, but for his own benefit. It was, however, necessary that every step in the case should be taken in the name of the nominal plaintiff.

As early as 1848, however, our Supreme Court, in the case of *Dazey v. Mills*, 5 Gilm. (10 Ill.) 67, so far recognized the party for whom the suit was brought as the real and substantial plaintiff, as to exclude declarations and admissions made by the nominal plaintiff after he had parted with his interest in the subject-matter of the suit. In that case the court said, p. 70:

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“It seems to be the tendency of modern decisions to recognize the rights of the beneficial party, and to protect him against the acts of the party possessing the naked legal interest, whenever it can be done without injuriously affecting the rights of the debtor; and subject to this qualification, we are inclined to adopt the rule in its fullest extent.”

Very clearly the admissions of the plaintiff would have been admissible against him if he had been suing for his own benefit, but they were excluded as against his usee.

Assuming, then, that an action in *indebitatus assumpsit* had been brought in the name of the debtor for the benefit of the creditor against the garnishees for the value of the goods conveyed, what defense could be made to such an action? It is obvious that if the suit had been brought for the benefit of the nominal plaintiff, no action could be successfully maintained by him because he had been paid. Would this also be a defense to an action brought for the benefit of his judgment creditor? It was very early decided in this State in *McHenry v. Ridgely*, 2 Scam. (3 Ill.) 309, that “when the plaintiff on the record is a mere trustee for another, the defendant may avail himself of any defense, which he might set up against the real owner of the instrument, provided the action had been brought in his name.” In other words, for the purposes of the suit, the beneficial plaintiff was from the first considered in this State as the real plaintiff, and defenses good as against him were admitted even where they would not have been good against the nominal plaintiff. This early decision was followed in *Merrill v. Randall*, 22 Ill. 227. The logical corollary to be drawn from this principle which recognizes defenses which are good only against the real plaintiff and not against the nominal plaintiff, is that a defense which is good against the nominal plaintiff alone, but which has no merit as between the real parties, cannot be availed

of against a beneficial owner in whose name the action had been brought.

In *Jones v. Witter*, 13 Mass. 304, the Massachusetts Supreme Court, in an action brought by the assignee in the name of the payee of a note not negotiable at law, held that the defendant having had notice of the assignment before he obtained a discharge from the payee, he could not avail himself of that discharge in prejudice to the assignee. In other words, while the defense was a perfect defense to an action if brought for the plaintiff's own benefit, it was not a defense to an action brought in his name for the beneficial use of the purchaser.

It was also held in *Lamb v. Vice*, 6 Meeson & Welsby, 466, that in an action on a bond brought in the name of the obligee, a defense which would have been good against the nominal plaintiff was not a good defense as against the real party in interest. Lord Abinger, C. B., remarked: "If the defendant had pleaded the bankruptcy of the plaintiff, it would have been a good replication that he was suing merely as trustee."

In the case at bar, so far as the actual parties to this proceeding are concerned, no sale of the goods in question has been made, for it is expressly declared by the statute to be void as between them. That being so, it seems clearly to follow that in a suit brought in the name of the vendor for the use and benefit of his creditor, a sale and payment cannot be set up as a defense which, so far as the real party plaintiff is concerned, does not exist. This conclusion is certainly in harmony with the intimation contained in the opinion of Mr. Justice Cartwright in *Commercial Nat. Bank v. Kirkwood*, 172 Ill. 563, where in speaking for the court, he said, p. 567:

"The law gave to the plaintiff, upon the commencement of its attachment suit, the right to avail itself of debts due to Rush, and, upon obtaining judgment against him, to use his name and recover for its use

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whatever might be due from Orr. In so doing it could not, *in the absence of fraud or collusion affecting its rights*, acquire any better right against Orr than Rush would have if he had brought the suit, but it would have the same right." (The italics are ours.)

We think the conclusion indicated above is further borne out by the decision of the Supreme Court in *G. S. Johnson Co. v. Beloosky*, *supra*, which was an appeal from a judgment in favor of the vendees of property where creditors of the vendors had levied an attachment upon the property sold, basing it upon a failure to comply with the Bulk Sales Act. This judgment was reversed and the rightfulness of the attachment was thereby necessarily sustained. If the goods so transferred by a sale void as to the creditors can be directly attached as the property of his debtor, we see no reason why they may not also be reached by garnishment proceedings. In support of the right of plaintiffs to reach the goods by garnishment proceedings, their counsel have cited *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1, which is, in all material respects, similar to the case at bar. In that case, although the general rule that a garnishee's liability to a creditor of the principal defendant is conditioned upon his liability to such defendant is recognized, a distinction is pointed out in the case of a conveyance fraudulent and void as to the creditor. They also cite *Kohn v. Fishbach*, 36 Wash. 69, and *Appel Mercantile Co. v. Barker (Grand Dry Goods Co.)*, 92 Neb. 669, 138 N. W. 1133, which are to the same effect. Counsel further maintain that as the Bulk Sales Law here under consideration is substantially the same as that adopted in Georgia, Washington and Nebraska, and as these decisions construing the statute were published long before the enactment of the Illinois statute, the General Assembly in adopting the statute presumably intended that it should receive the construction given it by the courts of the States from which it was adopted. That this is so unless such a

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construction is inconsistent with the spirit and policy of our laws, is fully sustained in *ReQua v. Graham*, 187 Ill. 67.

For the reasons given we are of the opinion that goods and chattels obtained by a sale from a debtor contrary to the provisions of the Bulk Sales Law, and consequently void as to creditors of the vendor, may be reached by such creditors in garnishment proceedings. The judgment of the Municipal Court will, therefore, be reversed and the cause remanded.

Reversed and remanded.

Johanna Kurowski, Defendant in Error, v. Louis Schurder and Pauline Schurder, Plaintiffs in Error.

Gen. No. 21,114. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action by Johanna Kurowski, plaintiff, against Louis Schurder and Pauline Schurder, defendants, in the Municipal Court of Chicago, to recover money deposited with defendant Pauline, and alleged to have come to the possession of the defendant Louis, which money was so deposited to be used by defendants for their own benefit and to be returned to plaintiff on demand. To reverse a judgment for plaintiff for \$446, defendants prosecute this writ of error.

FRANK F. TOLLKUEHN, for plaintiffs in error.

O'DONNELL & O'DONNELL, for defendant in error.

Kurowski v. Schurder et al., 198 Ill. App. 547.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to establish claim as to amount of money deposited.* In an action to recover money deposited with defendants to be used for their own benefit but to be returned on demand, where the evidence as to one portion of the money claimed by plaintiff to have been deposited was conflicting, evidence *held* sufficient to establish plaintiff's claim as to the amount deposited.

2. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to sustain finding that money loaned prior to specified date.* In an action for money loaned, where the evidence was conflicting as to whether a sum of money was loaned prior or subsequent to a named date, evidence *held* to show that such money was loaned prior to such date.

3. ASSUMPSIT, ACTION OF, § 18*—*when no duty to return deposited money until demand.* Where one deposits money with another with the understanding that the recipient shall use it for his own benefit and return it on demand, there is no duty or obligation resting upon such recipient to return it until a demand is made.

4. LIMITATION OF ACTIONS, § 20*—*when statute begins to run against claim for money loaned.* Where money is deposited with another to be used for the benefit of the recipient, and to be returned on demand, the statute of limitations does not begin to run until such demand is made.

5. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to sustain finding that one depositing money did not intend to make gift.* In an action to recover for money deposited with another to be used for the recipient's benefit and to be returned on demand, evidence examined and *held* that plaintiff did not intend to give the money to defendant.

6. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to sustain judgment in action to recover money deposited with another.* In an action to recover money deposited with another to be used by the recipient for her own benefit, and to be returned on demand, a judgment for plaintiff *held* sustained by the evidence where it appeared that plaintiff did not intend to give the money to defendant, and where no demand was made until shortly before bringing suit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Devoe & Raynolds Co. v. O'Malley, 198 Ill. App. 549.

**Devoe & Raynolds Company, Defendant in Error, v.
Patrick O'Malley, Plaintiff in Error.**

Gen. No. 21,191. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action by Devoe & Raynolds Company, a corporation, plaintiff, against Patrick O'Malley, defendant, in the Municipal Court of Chicago, to recover for paints, etc., delivered at and used in decorating defendant's building. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

THOMAS J. O'HARE, for plaintiff in error.

ELBERT C. FERGUSON, for defendant in error.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 475*—*what constitutes preponderance.* The question of the preponderance of the evidence does not depend solely on the number of the witnesses testifying.

2. SALES, § 329*—*what evidence may be considered in determining preponderance of evidence in action against owner of building for materials sold.* In an action to recover for paints, etc., where the defense was that defendant did not order the goods, which defendant claimed were for the benefit of his lessee, the court trying the case without a jury has the right to take into consideration, in determining the preponderance of the evidence, the fact that the goods were delivered at and used in decorating defendant's building, and that when defendant received a bill for the goods he did not repudiate liability, although such facts, of themselves, might

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not be sufficient to warrant the inference that defendant admitted responsibility for the bill.

3. **SALES, § 329***—*when evidence sufficient to sustain finding that owner of building assumed responsibility for payment for goods.* In an action to recover for paints, etc., delivered at and used in decorating defendant's building, where the evidence was conflicting as to whether defendant assumed responsibility for the bill, a finding for plaintiff held supported by the evidence.

**Maurice Spitzer, Defendant in Error, v. Evelyn Meyer,
Plaintiff in Error.**

Gen. No. 21,237. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed April 12, 1916.

Statement of the Case.

Action by Maurice Spitzer, plaintiff, against Evelyn Meyer, defendant, in the Municipal Court of Chicago, to recover for architect's services. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

MOSES, ROSENTHAL & KENNEDY, for plaintiff in error; JULIUS MOSES and SIGMUND W. DAVID, of counsel.

RIEGER & RIEGER, for defendant in error; FRANKLIN S. CATLIN and LOUIS RIEGER, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

1. **WITNESSES, § 33***—*when husband competent witness for wife.* The husband of a married woman is a competent witness in her behalf under section 5 of the Evidence Act (J. & A. ¶ 5522), in a suit against the wife to recover for architect's services.

2. **TRIAL, § 68***—*when denial to counsel of right to make full offer of what will be proved by witness reversible error.* It is reversible error to deny to counsel the right to make fully his offer of what he intends to prove by a witness whose testimony the court has intimated an intention to exclude, although the other side objects that the offer was merely to prove what another witness had already testified to.

Ida Osberg by Jacob Osberg, Appellee, v. Cudahy Packing Company, Appellant.

Gen. No. 21,292. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Ida Osberg, a minor, by Jacob Osberg, her next friend, plaintiff, against Cudahy Packing Company, a corporation, defendant, for personal injuries alleged to have been caused by the negligence of the defendant. From a judgment against it for \$3,000, defendant appeals.

The declaration originally consisted of six counts, but prior to the trial, on motion of plaintiff's attorneys, it was amended by dismissing the fourth, fifth and sixth. The first count alleged, in general terms, that the defendant carelessly and negligently drove its automobile truck, and in consequence the plaintiff was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

struck and run over. The second count charged that the defendant carelessly and negligently drove the truck at a high, dangerous and excessive rate of speed, to wit, forty miles an hour, while the third count charged that the defendant failed to ring the bell or sound the horn with which the truck was equipped, or otherwise to warn the plaintiff of the danger.

The evidence disclosed that a chauffeur and helper in the employ of the defendant were driving a truck weighing about 8,700 pounds, loaded with about five tons of meat, in a westerly direction along the north side of Hastings street. The chauffeur and helper were seated in the cab or covered seat, which had celluloid curtains front and back, but open at the sides. The back curtain had holes covered with celluloid about twelve inches square, but there was no testimony as to how the front curtain was constructed.

The truck entered Hastings street at Loomis street, in the vicinity of Laflin street. On the north side of Hastings street a band was playing, and there were children running about in the street. About seventy-five feet from Laflin street, the plaintiff, a little girl about four years of age, ran out into the street and was struck and run over by the truck. As a result it became necessary to amputate her left arm about three inches from the shoulder.

The testimony of all the witnesses substantially agrees in regard to the physical condition of the street and the presence of the children in the vicinity, but there was a conflict in regard to the rate of speed at which the truck was going, and the question of whether there were wagons and a buggy along the north side of Hastings street near the curbstone.

The chauffeur's testimony was to the effect that there were two wagons and a buggy; that the little girl ran out from in front of the horse attached to the buggy; that she was about eight feet from him when he saw her; that he used the emergency and foot brakes,

and did all he could to stop the car; that he could make an emergency stop in about twenty feet; that she was about ten feet behind the car when it stopped; that his helper was blowing the whistle; that when he entered Hastings street he was going about twelve miles an hour, but before the accident he slowed down to eight miles an hour. He was corroborated by the testimony of his helper, who, however, said that he did not see the little girl until after the accident. He was also corroborated by a policeman, who said that the truck was going at a slow rate of speed, and that there was a large crowd of little children running around the street to hear the band.

The witness Stein, for the plaintiff, testified that there were no wagons nor buggy near the place of the accident; that the little girl was about ten feet from the curbstone when she was struck; that he did not hear any horn or bell, and that there was a band playing on the other side of the street.

A witness who saw the accident from a window said the car was going ten or twelve miles an hour; that there were no buggies nor vehicles along the north side of the street, and that the truck was about fifteen or twenty feet beyond the place of the accident. Her testimony was corroborated by that of another witness.

Counsel for defendant contended that the evidence did not establish any negligence on its part. The undisputed evidence showed the gross weight of the loaded truck was about nine and one-half tons. Plaintiff's witnesses testified that it was going from ten to twelve miles an hour, while defendant's testified it was going from seven to eight miles an hour. All agreed that there were many little children in the street in the vicinity of the truck, attracted by the playing of a band.

JOHN A. BLOOMINGTON, for appellant.

DANIEL A. LEVY, for appellee.

Osberg v. Cudahy Packing Co., 198 Ill. App. 551.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. **NEGLIGENCE, § 191***—*when question of fact.* In an action to recover for injuries by an automobile or other vehicle, the question whether the speed at which such automobile or other vehicle was driven was negligent is a question for the jury where the evidence is conflicting.

2. **APPEAL AND ERROR, § 1411***—*when verdict not set aside where evidence conflicting.* Where the evidence as to whether or not the rate of speed at which an automobile truck was being driven was negligent is conflicting, the verdict will not be set aside on appeal when not against the weight of the evidence.

3. **INSTRUCTIONS, § 135***—*when failure to give unasked instruction not error.* Failure to instruct as to the dismissal of certain counts of a declaration is not error when such instruction was not asked and the declaration as it existed at the time of the trial did not contain the counts in question.

4. **INSTRUCTIONS, § 110***—*when instruction as to right to recover not objectionable.* In an action to recover for injuries alleged to have been caused by defendant's auto-truck, certain counts in the declaration of which were dismissed on plaintiff's motion before trial, an instruction that "if the defendant carelessly and negligently drove the auto-truck as charged in the declaration," they should find the defendant guilty, is not objectionable as permitting the jury to find defendant guilty on a count which had been dismissed.

5. **DAMAGES, § 211***—*when instruction as to amount recoverable for personal injuries not objectionable.* In an action to recover for personal injuries, it is proper to give an instruction allowing a recovery for "all damages, present and future, if any, which from the evidence can be treated as a necessary and direct result of the injury complained of."

6. **INSTRUCTIONS, § 96***—*when instruction as to credibility of witness not improper.* An instruction that if the jury believe "that any witness has wilfully and knowingly sworn falsely to any material element in this case, then they have a right to reject the entire testimony of this witness, except in those matters, if any there be, where his or her testimony is corroborated by other credible evidence or by facts and circumstances appearing in the case," is proper.

7. **INSTRUCTIONS, § 89***—*when instruction as to preponderance of evidence not objectionable.* An instruction to the jury as to de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hart v. Hart, 198 Ill. App. 555.

termining the preponderance of the evidence, which tells them that they may take into consideration the number of witnesses testifying, is not objectionable.

8. INSTRUCTIONS, § 131*—*when refusal of instruction ignoring theories of case proper.* In an action to recover for personal injuries to a child by defendant's automobile, an instruction that "if the child ran in front of the automobile so suddenly that the driver had no notice of any danger," etc., then plaintiff could not recover, is properly refused since it fails to take into consideration the question whether the accident was the result of such negligent driving as made it impossible for defendant's chauffeur to avoid the accident after seeing the child.

9. EVIDENCE, § 52*—*when refusal of evidence not connected with physical facts of case not error.* In an action for personal injuries, the refusal to permit a witness to testify as to what was visible to him at a certain point is not error, where such point was not the one from which the accident was seen by another witness to whose testimony the question related.

Paul A. Hart by George A. Hart, Appellant, v. Jessie Hart, Appellee.

Gen. No. 21,351. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916. Rehearing denied April 24, 1916.

Statement of the Case.

Bill by Paul A. Hart, a minor, by George A. Hart, his next friend and guardian *ad litem*, complainant, against Jessie Hart, defendant, to annul the marriage of complainant and defendant.

Complainant exhibited his bill of complaint relating that he was nineteen years of age, that while under the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hart v. Hart, 198 Ill. App. 555.

age of eighteen, a marriage ceremony was performed between the complainant and the defendant, that immediately upon the performance of the ceremony complainant and defendant separated, that the marriage was never consummated, that the parties never entered into the marriage status nor lived together as man and wife, and that said marriage was never ratified by complainant in any manner thereafter, and therefore he asked that the marriage be declared null and void. The answer of the defendant admitted the marriage, asserted its validity, averred that defendant and plaintiff lived together as man and wife, and that as a result of the marriage two children were born, that defendant was living separate and apart from complainant without any fault on her part, that complainant had abandoned her and neglected and refused to contribute to the support of herself and children. Thereafter, she filed her cross-bill containing allegations similar to those in her answer, and asked that her husband be decreed to provide for her support and maintenance and for the support and maintenance of said children, and alleged that she was then dependent for support upon the charity of her friends; that complainant was employed as a bank clerk, receiving at least twenty dollars a week, that he was a strong, healthy man, able to provide for and support cross-complainant and her children, and asked for separate maintenance and for temporary solicitor's fees. The cross-bill was sworn to. The affidavits of the complainant, his father and mother sustained the allegations in the bill, and tended to show that he was attending school, and not engaged in any business.

Upon reading the bill of complaint, cross-bill, answers and affidavits, the court entered an order allowing temporary alimony and solicitor's fees, from which the complainant appealed upon the ground that the court was without authority to enter it, for the reason that defendant was not complainant's wife, because

the marriage was void, and, if only voidable, had long since been repudiated by the complainant.

RANKIN & DUNN, for appellant; ODE L. RANKIN, of counsel.

CASWELL & HEALY, for appellee.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. MARRIAGE, § 29*—*when allowance of temporary alimony and solicitor's fees proper in suit to annul illegal marriage.* The word "wife" in section 15 of the Divorce Act (J. & A. ¶ 4230), providing for temporary alimony and solicitor's fees, is not to be construed as limiting the authority of the court to grant such allowances only in cases of lawful marriages, but to permit it to do so in suits to annul void or voidable marriages also.

2. DIVORCE, § 1*—*when term applicable to annulment of illegal marriage.* The term "divorce" as used in the Divorce Act (J. & A. ¶ 4215 *et seq.*) is not confined to the annulment of lawful marriages, but embraces also suits to declare the nullity of illegal marriages, though void *ab initio*.

3. DIVORCE, § 1*—*when term "wife" includes one entering into void marriage.* The term "wife or wives" as used in section 19 of the Divorce Act (J. & A. ¶ 4234) includes those who have entered into void marriage contracts.

4. MARRIAGE, § 29*—*when allowance of temporary alimony and solicitor's fees proper though validity of marriage denied.* In an action to annul a marriage as invalid, it is not error to allow temporary alimony and solicitor's fees where there is a *prima facie* showing of a valid marriage.

5. MARRIAGE, § 29*—*when entry of order in personam for temporary alimony and solicitor's fees proper without service of process on cross-bill for separate maintenance.* Where a minor has exhibited a bill in chancery to have his marriage annulled as invalid and defendant files a cross-bill for separate maintenance, the chancellor may enter an order *in personam* for temporary alimony and solicitor fees without service of process on the cross-bill.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fiedler et al. v. Bishop, 198 Ill. App. 558.

**Abraham Fiedler and Yetta Fiedler, Appellees, v.
James F. Bishop, Administrator, Appellant.**

Gen. No. 21,400. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed April 12, 1916.

Statement of the Case.

Action by Abraham Fiedler and Yetta Fiedler, plaintiffs, against James F. Bishop, as administrator of the estate of Anna Lietzau, deceased, defendant. Defendant appeals from a judgment of the Municipal Court denying his motion to vacate a judgment entered August 6, 1913, by confession against his decedent for \$2,000 and \$200 attorney's fees, on a judgment note dated Chicago, August 5, 1913, for \$2,000, payable thirty days after date to the plaintiffs. An order was entered October 13, 1914, allowing the entry of a motion on behalf of defendant's administrator to vacate the judgment, and setting the hearing for October 23, 1914. On the same day, defendant filed his petition reciting the giving of the judgment note by his decedent August 5, 1913, for \$2,000, and alleging upon information and belief that his decedent, on August 5, 1913, and for a long time prior thereto, and from thence until her death on August 18, 1915, was an habitual drunkard, and under medical treatment therefor; that on said 5th day of August, and for a long time prior thereto and from then until her death, her reason, mind and memory had been broken down by a long-continued course of excessive indulgence in intoxicating drinks; that for a long time prior thereto she was so frequently and continuously intoxicated that she did not clean her flat or cause it to be cleaned, nor the dishes used by her, and that for two weeks prior to

August 5th her condition had been such that she was unable to leave the flat; that plaintiffs supplied her with intoxicating liquors and that her condition was such that plaintiffs must have known that she was about to die shortly thereafter; that she did die on August 18th, on account of and because of the excessive use of the intoxicating liquors, of cirrhosis of the liver; that she was on the 5th day of August mentally incompetent to execute the note in question or to transact business; that at the time of signing the note she did not know the nature of the instrument signed by her, and that it was executed without any valuable consideration given therefor; that she did not thereafter remember that she had signed it, and that said note was fraudulently obtained by plaintiffs. Petitioner further represented that his first information or knowledge of these facts was obtained in July, 1914, when the attorney for one Lucille Kreplin, a minor, and Louisa Lietzau Geier, the only heirs at law of the decedent, informed him of them; that he verily believes that he has a good defense, and asks that the judgment be set aside and vacated, and that he have leave to file an affidavit of defense, and tenders the sum of \$6 costs for a jury. Petitioner filed a number of affidavits tending to sustain the allegations as to his decedent's incapacity.

WALTER A. BRENDKE, for appellant.

FRED W. KRAFT and GEORGE F. PFIRSHING, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Woodbury v. Continental Casualty Co., 198 Ill. App. 560.

Abstract of the Decision.

1. JUDGMENT, § 58*—*when judgment by confession set aside.* On timely application to set aside a judgment by confession, it is the court's duty to allow defendant to plead if a meritorious defense is shown by proper affidavits.

2. JUDGMENT, § 82*—*when affidavits sufficient to warrant granting of motion to set aside judgment by confession.* Affidavits on a motion to set aside a judgment by confession examined and held to set up a meritorious defense.

3. JUDGMENT, § 82*—*when application to set aside judgment by confession not defeated by laches.* Affidavits on motion to set aside judgment by confession examined and held not to show such laches as to require the denial of the motion.

George Trumbull Woodbury, Appellant, v. Continental Casualty Company, Appellee.

Gen. No. 21,801.

1. APPEAL AND ERROR, § 839*—*when time of filing of bill of exceptions to be determined by the record.* The time at which the bill of exceptions was filed must be determined by the record, and resort cannot be had to statements of counsel or affidavits.

2. APPEAL AND ERROR, § 846*—*what proper practice at common law as to date of signing and sealing bill of exceptions.* The proper practice at common law and under earlier Illinois practice was to insert, as the date of the signing and sealing of a bill of exceptions, the date of the trial or the time when the exceptions were actually taken.

3. APPEAL AND ERROR, § 846*—*when date of signing of bill of exceptions fictitious.* According to the practice obtaining in Illinois, the date upon which a bill of exceptions is recited to have been signed is ordinarily and usually fictitious.

4. APPEAL AND ERROR, § 846*—*when face of bill of exceptions shows it not to have been signed on presentation.* Face of bill of exceptions examined and held to show that it was not signed at the time when it was presented.

5. APPEAL AND ERROR, § 846*—*when face of record shows bill of*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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exceptions to have been signed on day of filing. Matters appearing of record examined and *held* to show that the bill of exceptions was not signed on the date inserted therein, but that it was actually signed on the day it was filed.

6. APPEAL AND ERROR, § 846*—*when recitation in bill of exceptions as to date of signing not conclusive.* The recitation in a bill of exceptions as to the date of its signing is not conclusive, but the date may be determined by an examination of the face of the record.

7. APPEAL AND ERROR, § 846*—*what proper practice as to dating bill of exceptions.* The proper practice is that a bill of exceptions should recite the actual date on which it is signed.

8. APPEAL AND ERROR, § 846*—*when bill of exceptions signed in apt time.* Where a bill of exceptions, presented within the time allowed, is signed three days after the date to which the time of filing has been extended by order of court entered on stipulation of counsel, it is signed in apt time.

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Motion to strike bill of exceptions denied. Opinion filed April 12, 1916.

FREDERICK A. BROWN and RAYMOND S. PRUITT, for appellant; JOHN G. McDONALD, of counsel.

M. P. CORNELIUS and GEORGE R. SANDERSON, for appellee; MANTON MAVERICK, of counsel.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Appellee filed herein its motion to strike the bill of exceptions from the record for the reason, among others, that it was not filed with the clerk of the Circuit Court within a reasonable time after it had been signed by the trial judge. The state of the instrument discloses the usual recitation with reference to its presentation and request that it be signed, etc., ending with the words, "which is accordingly done this, the 1st day of July, A. D. 1915. Lockwood Honore, Judge. (Seal)." The words "1st," "July," and "Lockwood Honore," are written in ink. Below the signature ap-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pears the following typewritten statement: "I HEREBY CERTIFY that the foregoing bill of exceptions was presented to me this 1st day of July, A. D. 1915, to be signed and sealed. L. Honore, Judge. (Seal)." The signature "L. Honore" is in lead pencil. To the left, and below, is written in ink, "O. K., M. P. Cornelius, Atty. Cont. Cas. Co." It is marked by the clerk "Filed *nunc pro tunc* as of July 1st, 1915, Jul. 13, 10:14 A. M. 1915, John W. Rainey, Clerk." The following order was entered July 13th:

"And it appearing to the court, on good cause shown, and that the bill of exceptions in the cause before entitled was presented and so marked in open court July 1, 1915, within the time fixed by the court for filing said bill, on motion of Brown & Pruitt, attorneys for the plaintiff, it is hereby ordered that the said bill of exceptions signed and dated July 1, 1915, be filed *nunc pro tunc* as of the same day, to wit, July 1, 1915. Enter: L. Honore, Judge."

Counsel for appellant contend that the bill of exceptions was not signed on July 1st, but on July 13th, the date it was actually filed. Counsel for appellee, without denying this to be the fact, assert that the matter must be determined by the record, and that resort cannot be had to statements of counsel or affidavits. We are of the opinion that the contention of appellee in this regard must be sustained. Counsel for appellee base their proposition that the record was not filed within a reasonable time on their contention that the record shows that the bill of exceptions was signed on July 1, 1915, and that it was not filed until thirteen days thereafter. The first question necessary to be examined, therefore, is whether the recitation in the bill of exceptions itself, "which is accordingly done this the 1st day of July, A. D. 1915," determines the actual date of the signing. The practice at common law and the early practice in this State was to insert, as the date of the signing and sealing, the date of the trial or the time when the exceptions were actually taken.

That this is the proper practice is shown by the case of *Evans v. Fisher*, 5 Gilm. (10 Ill.) 453, citing *Walton v. United States*, 9 Wheat. (U. S.) 651; *Ex parte Bradstreet*, 4 Pet. (U. S.) 107; and *Law v. Merrills*, 6 Wend. (N. Y.) 268. In *Wabash, St. L. & P. Ry. Co. v. People*, 106 Ill. 652, it is said that in all cases it should appear on its face to have been taken and signed at the trial. In *T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, 250 Ill. 242, Mr. Justice Carter, speaking for the court, after referring to the usual practice of dating the bill of exceptions as of the date of the judgment, said, p. 246:

“As a matter of proper practice the judge should have dated it, after signing, as of the date when it was presented, and an order should have been procured filing it as of that date.”

From these authorities it is plain that the date upon which a bill of exceptions is recited to have been signed is ordinarily and usually fictitious. There are cases, however, where the date is very obviously and conclusively the date of the actual filing, as, for instance, where it is neither the date at which the exceptions were taken, nor the date upon which the bill of exceptions was presented, but a date subsequent to the time limited for presenting the bill of exceptions. In such a case there is, of course, no reason for the insertion of the date selected, except the fact that it was the date upon which the bill was actually signed. This may be illustrated by the case of *Illinois Improvement & Ballast Co. v. Heinsen*, 271 Ill. 23, where the judgment was entered April 5, 1913, the bill of exceptions presented June 23, 1913, the time for presenting expired August 15, 1913, and it appeared to have been signed September 27, 1913. It is obvious that there could have been no reason for selecting that date except the fact that it was the date upon which the bill was signed.

The question arises, then, as to whether in the case at bar the recitation in the bill of exceptions so con-

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clusively fixes the date of the signing as to justify the court in striking it from the files upon the theory that it was actually signed upon that date, and that in consequence, the filing July 15th was not within a reasonable time. Counsel for appellee, in support of their contention that July 1st was the date upon which the bill of exceptions was actually signed, suggest that it is not customary for a judge to give more than a formal examination to a bill of exceptions where it is O. K'd by the parties. He therefore concludes that as this bill now appears to have been O. K'd by the appellee, we are to assume that it was signed upon the date it was actually presented upon the faith of appellee's certification to its correctness. We think, however, that the face of the bill of exceptions itself shows unmistakable evidence that the bill of exceptions was not signed on the date it was presented, and that appellant's counsel did not expect it to be signed on that date. It will be noted that in the certificate reciting that the bill of exceptions was presented to the trial judge for signature the 1st day of July, the date is typewritten, while in the case of the recitation with reference to signing and sealing, the date is filled in with ink. The signature to the former was in lead pencil; to the latter it was in ink. Had the bill been O. K'd at the time it was presented to the trial judge, there would obviously have been no reason for a certificate that it was presented July 1st, for it would in ordinary course have been signed and sealed at once upon the faith of counsel's O. K. The signing of the certificate, in our opinion, is inconsistent with the theory that there was an O. K. upon the bill at the time it was presented, and indicated clearly an intention upon the part of the court to postpone the signing and sealing of the bill until a later date. The cases of *Illinois Improvement & Ballast Co. v. Heinsen*, *supra*, and *Hall v. Royal Neighbors*, 231 Ill. 185, are clearly distinguishable from the case at bar, in that the rec-

ord in each of those cases showed, and it was not disputed that it did show, the actual date of the signing. It may be noted also that in the *Heinsen* case, *supra*, the bill of exceptions was not signed until forty-three days after the time for presenting it had expired, and was not filed until twenty-one days thereafter.

In the case at bar, even the date of the filing was within three days from the expiration of the time allowed for the bill of exceptions, and thirteen days from the date of its presentation. It seems obvious that the insertion in the bill of exceptions of the date of presentation was due to the statement of Mr. Justice Carter in *T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, *supra*, quoted above, to the effect that it should be signed "as of the date when it was presented, and an order should have been procured filing it as of that date."

We are clearly of the opinion that the matters appearing of record demonstrate that the bill of exceptions was not signed on the date inserted therein, but that, on the contrary, the state of the record clearly indicates that the bill of exceptions was actually signed on the day it was filed, and that in dating it as of the date when it was presented, counsel followed the suggestion of the court in the *Hill* case, *supra*. While this practice avoids the apparent inconsistency which arises when a bill of exceptions is filed as of the date when it is presented, but recites on its face that it was signed and sealed at a later date, yet, in view of the question which has arisen here as the result of following the practice of reciting the date of its presentation as the date when it was signed, we venture the suggestion that similar difficulties may be avoided by reciting the actual date of the signing—a practice which has been repeatedly approved by our Supreme Court.

Appellee's contention that the bill of exceptions was not signed in apt time is also without merit, in view of the stipulation signed by its attorney "that the

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time for filing the bill of exceptions in the cause above entitled be again extended to the 19th day of July, A. D. 1915," and the order of court entered thereon. The law is very clear that such a stipulation empowers the court to extend the time for presenting a bill of exceptions, even where it is entered into after the time has expired. (*Hawes v. People*, 129 Ill. 123; *Loeff v. Tausig*, 102 Ill. App. 398.)

In *Evans v. Fisher, supra*, the court went so far as to recognize an oral agreement by the parties in regard to the settlement of a bill of exceptions after the term had expired, and no order had been entered, although the making of the agreement itself was disputed.

For the reasons above given we are of the opinion that the bill of exceptions in this case was presented and filed in apt time. The motion will, therefore, be denied.

Motion denied.

J. C. Pennoyer Company, Defendant in Error, v. Eugene Wendnagel and William Wendnagel, trading as Wendnagel & Company, Plaintiffs in Error.

Gen. No. 20,298. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed April 12, 1916.

Statement of the Case.

Action by J. C. Pennoyer Company, a corporation, plaintiff, against Eugene Wendnagel and William Wendnagel, copartners, trading as Wendnagel & Company, defendants, to recover seventy-five dollars for services rendered.

J. C. Pennoyer Co. v. Wendnagel et al., 198 Ill. App. 566.

The case was tried by the court without a jury, and judgment was entered in favor of plaintiff for the amount claimed, from which defendants bring error.

The evidence showed that in October, 1912, plaintiff was under contract with the South Halsted Street Iron Works to haul a steel girder from the latter's place of business, located on South Halsted street, to the Alaska Theater, located on 31st street. To do this work it required twelve horses and five men. On the morning of October 1, 1912, plaintiff's men and horses went to the South Halsted Street Iron Works to load the girder. When they arrived there they found a Mr. Carter, who was in the employ of the defendants. The girder was loaded on a wagon and taken to the Alaska Theater, but on account of some obstruction in the alley near the theater, plaintiff was unable to deliver the girder at the place desired. Plaintiff's men, after waiting a reasonable time, informed Mr. Carter, who had accompanied them to the theater, that they could not allow their teams and men to wait any longer; that unless the girder was unloaded at once, plaintiff would charge twenty-five dollars per hour for any further delay. Thereupon Carter went to a nearby telephone, and shortly afterwards returned and told the plaintiff's men if they would wait until the girder could be delivered at the proper place, they would be paid for such delay. Plaintiff's men waited for three hours before they could deliver the girder, and this suit was brought to recover for the three hours' delay at twenty-five dollars per hour.

One of the defendants testified that Mr. Carter was in their employ; that he was primarily an estimator on steel contracts; that he lived near the Alaska Theater, and that he was instructed to go to the theater three mornings each week and inspect the work and see how it was getting along. The witness further testified that Carter was not authorized by the defendants

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to make any agreement with the plaintiff's men in their behalf.

ADAMS, CREWS, BOBB & WESCOTT, for plaintiffs in error.

BOYLE & MOTT, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 387*—*when evidence insufficient to sustain recovery.* Evidence in action to recover for services alleged to have been performed under contract, examined and held insufficient to support verdict.

Philip Henrici Company, Appellant, v. Carrie Alexander et al., Appellees.

Gen. No. 20,934.

1. CONSPIRACY, § 14*—*when evidence insufficient to show illegal boycotting.* On a bill to enjoin defendants from unlawfully conspiring to boycott complainant's business, evidence examined and held not to show an illegal act on defendant's part.

2. CONSPIRACY, § 8*—*when distribution of printed matter not illegal.* On a bill to enjoin defendants from printing or publishing any printed matter calling attention to the fact that complainant's business is unfair and not unionized or that a strike is on, held that the distribution of a publication purporting to give information regarding the strike and of printed matter stating that complainant was unfair was not illegal.

3. CONSPIRACY, § 14*—*when evidence insufficient to show conspiracy beyond reasonable doubt.* On a bill and cross-bill, each alleging a conspiracy to injure business, evidence examined and held insufficient to establish a conspiracy beyond a reasonable doubt, as required by law.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. CONSPIRACY, § 8*—*when picketing illegal*. Where the facts show that there was no strike, and the pickets made statements not warranted by the facts, and by reason of the picketing crowds congregated which interfered with complainant's business, the picketing was properly enjoined.

5. CONSPIRACY, § 14*—*when evidence sufficient to show picketing*. On a bill to enjoin defendants from interfering with complainant's business, evidence that defendants patrolled in front of complainant's restaurant, in which there was no strike, stating to each other so that they could be heard by passers-by that there was a strike on at such place; "We want \$8 for six days' work"; "Don't eat under police protection," and words of similar import, is sufficient to show picketing tending unlawfully to interfere with complainant's business against which an injunction would be granted.

6. CONSPIRACY, § 16*—*when decree enjoining picketing and patrolling modified*. On a bill to enjoin picketing and patrolling complainant's place of business, where the evidence shows the picketing was not justified, the decree enjoining such picketing and patrolling should not be qualified by adding thereto the words "in such a manner as to intimidate, threaten or coerce any person or persons from entering or who may desire to enter said premises for the purpose of patronizing the complainant, or for any lawful purpose whatsoever," and on appeal the decree will be modified by striking the qualification therefrom.

Goodwin, J., dissenting in part.

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGoorty, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Decree modified and affirmed. Opinion filed April 12, 1916.

McEWEN, WEISENBACH, SHRIMSKI & MELOAN, for appellant.

EDGAR L. MASTERS, for appellees.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Appellant filed a bill for injunction in the Circuit Court of Cook county against the appellees, and after

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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answer filed, appellees filed a cross-bill praying for an injunction against the appellant and other parties. The cause came on for hearing before the Honorable John P. McGoorty, who associated with himself the Honorable Jesse A. Baldwin and the Honorable Thomas G. Windes, judges of said court. From a decree dismissing the cross-bill for want of equity and awarding an injunction in favor of appellant for less than the relief prayed, both parties were allowed an appeal. Appellant has perfected its appeal in this court, and appellees have assigned cross-errors. For convenience, the parties will hereafter be designated as complainant and defendants as in the court below.

Complainant is a corporation engaged in the restaurant and bakery business in the City of Chicago, and has conducted said business for a number of years. The business is successful and profitable. At the time of the filing of the bill it served more than 2,000 patrons daily in its restaurant, some of whom had been customers continuously for a number of years. Complainant employed about 125 persons in various capacities, including 54 waitresses, 7 cooks and 10 bakers. Many of them had been in its employ for years. The waitresses received wages ranging from \$3.50 to \$7 per week, depending on the number of hours worked which varied from 18 to 57. In addition to their wages the girls received their meals. The evidence also tended to show that as a result of gratuities or "tips," given to the waitresses by the patrons, the amount received, including their wages, aggregated from \$15 to \$25 per week.

About six months prior to the filing of the bill, the Waitresses' Union, Local No. 484, co-operating with the Chicago Cooks' and Pastry Cooks' Union, Local No. 865, and the Bakers' and Confectioners' Union, Local No. 2, began a campaign in Chicago to unionize the restaurants of the city. The primary purpose of the unions was the improvement of the working condi-

tions of the waitresses, including a minimum wage of \$8 per week, consisting of a maximum of 60 hours, and one day of each week for rest and recreation. As a result of such campaign more than 100 restaurants, principally in the loop district of the city, signed the union agreement which embodied the working conditions above mentioned, and provided for a closed shop. In pursuance of the campaign representatives of the three unions called upon the complainant and requested it to sign a similar trade agreement. Complainant informed them that many of its waitresses had been in its employ for a number of years; that they were satisfied with their working conditions, and at no time had they made any complaint; that it would interpose no objection to the waitresses joining the union, and further time was asked by the complainant to consider the agreement submitted. At a subsequent meeting complainant informed the union representatives that it had become a member of the Restaurant Keepers' Association of Chicago, which consisted of about 40 members, and that further negotiations with reference to the agreement must be taken up with said Association. This was in accordance with a provision of the Constitution of said Association, which is as follows:

“Any member who shall settle a strike or demand of any labor organization whatever affecting the general welfare of the members of this Association shall be suspended and not reinstated until he shall have complied with the conditions which this Association may impose.”

Further negotiations were had between the Association and defendants in this regard. Complainant refused to sign the agreement, and pursuant to a resolution passed by the three unions, a strike was called at the restaurant of complainant, February 5, 1914. On the same day 4 of the 10 bakers, members of the union, quit work; also 2 of the 7 cooks, whose reason for leav-

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ing is in dispute. All of the waitresses, however, continued with their work as before, none of them being members of the union. The evidence for the complainant tends to show that it made no discrimination in the hiring of its employees in favor of or against union labor, while evidence on behalf of the defendants tended to show that waitresses belonging to the union had been discharged by the complainant because they were members of the union.

On February 5, 1914, from 6 to 10 members of the waitresses' union, in accordance with instructions from the union, patrolled in front of complainant's restaurant, walking back and forth from a point about 25 feet east to a point about the same distance west of the restaurant, and saying to each other so that they could be heard by the passers-by: "There is a strike on at Henrici's." "We want \$8 for six days work." "Don't eat under police protection," and words of similar import. On one occasion one of the pickets wore a mackintosh on which was printed the following words: "We want \$8 for six days work." Match boxes on which it was stated that the complainant was "unfair" were sent out from the waitresses' union, together with a publication known as the Bakers' Journal which purported to give information regarding the strike, and were distributed to the public. The pickets were supplemented at times by one to three members of the bakers' and cooks' unions. The patrolling was done principally at the lunch and supper hours. The pickets were instructed by the union to obey the law and continue moving; that they were not to accost any one nor allow any one to accost or speak to them; that the picketing must be peaceful, and that they should give general information to the public in regard to their grievances to gain its moral support.

Complainant's restaurant is located at Nos. 67 to 71 West Randolph street, Chicago, in what is known as the loop district. The picketing attracted large crowds

to the vicinity and in front of the restaurant. Crowds also congregated on the opposite side of the street and at times interfered with the business conducted on the street in the vicinity of the restaurant. The picketing continued until March 6th, and the evidence tends to show that during the picketing the number of customers per day at the restaurant was about 250 less than normal. Pickets were arrested daily, the number of arrests aggregating 119. One of them was arrested 15 times, and three of them complained of brutality on the part of the police. They were charged with criminal conspiracy, disorderly conduct, obstructing the sidewalk, etc. It is admitted that none of the pickets committed any act of violence.

The bill contains the usual allegations, and prays that the defendants be enjoined from unlawfully conspiring to boycott or interfere with complainant's business; from interfering with its employees by intimidation, insults or threats; from printing or publishing any printed matter calling attention to the fact that complainant's business is unfair and not unionized or that a strike is on; from patrolling in front of or adjacent to the restaurant, etc. The cross-bill makes the complainant, the chief of police, John Vogelsang, Chicago Restaurant Keepers' Association, and unknown police officers, parties defendant. It charges the cross-defendants with entering into a conspiracy to injure the waitresses' union and certain unions cooperating in the strike, thus making the same charge against the complainant as is made against the defendants. It alleges that the cross-complainants have not entered into any controversy for the purpose of injuring complainant's business, but that they are acting in the strike for the purpose of strengthening their organization, in order that the members thereof may profit by better economic conditions, higher wages, less hours of service, and better conditions. The prayer

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was that the cross-defendants be enjoined from continuing the conspiracy, and from doing any act to injure the unions.

After a full hearing a decree was entered dismissing the cross-bill for want of equity and providing: "That the defendants to the original bill and each of them and their attorneys, solicitors, agents, servants and associates and each and every of them be enjoined and restrained from unlawfully hindering, obstructing or interfering with the business of the Complainant, Philip Henrici Company, or its employees, by any act of violence or intimidation or by picketing or patrolling the street in front of or in the alley in the rear of Complainant's place of business at 67 to 71 West Randolph street, in the City of Chicago, Cook County, Illinois in such a manner as to intimidate, threaten or coerce any person or persons from entering or who may desire to enter said premises for the purpose of patronizing the Complainant, or for any lawful purpose whatsoever."

Both parties are dissatisfied with the decree. The complainant contends that the court should have entered a decree in accordance with the prayer of the bill; that the evidence clearly established that the defendants were guilty of a conspiracy to injure the business of complainant, and that they were guilty of boycotting complainant's business. The defendants contend that the evidence established that the cross-defendants are guilty of a conspiracy to injure the defendants' union.

The court held, after a careful review of the authorities, that neither party had proven the charge of conspiracy beyond a reasonable doubt as required by law; that the so-called boycotting was not illegal, and that the distribution of the publication by the defendants, to which objection is made, should not be enjoined. In this conclusion we concur.

The principal controversy, however, in this case, is as to the right of the defendants to picket complainant's place of business in the manner shown by the evidence. The complainant contends that, under the law of this State, there is no such thing as peaceful picketing, and that under the law and facts in this case, the picketing should be enjoined without qualification. In support of its contention numerous cases are cited. Reliance, however, is placed chiefly on the case of *A. R. Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424. On the other hand, the defendants contend that peaceful picketing is not unlawful; that no act of violence was committed by any of the pickets (this is conceded by the complainant), and that therefore the bill should be dismissed for want of equity. In support of their contention, the defendants cite the cases of *Kemp v. Division No. 241*, 255 Ill. 213; and *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45.

In the *Barnes* case, *supra*, a decree was entered enjoining the defendants, among other things, "from picketing or maintaining at or near the premises of said complainants, or any of them, any picket or pickets." In that case the complainants were engaged in the printing business. On account of some dispute over the hours of labor, etc., a strike was called and complainant's place of business was picketed. The pickets were guilty of threats and actual intimidation. In passing on the question of picketing, the majority of the court, speaking by Mr. Justice Cartwright, say (p. 435): "It is next contended that if any injunction was authorized, the injunction granted was too broad in enjoining appellants from peaceful picketing of complainants' premises and from congregating about or near their places of business for the purpose of inducing or soliciting employees to leave the employment. It is contended that a peaceful picket line around a shop is entirely lawful. But this court has held otherwise in *Franklin Union v. People*, *supra* (220 Ill. 355),

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where endorsement was given to the doctrine of *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, by quoting therefrom, as follows: 'To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It, itself, is an act of intimidation and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or ten hundred feet away.' The court also gave its approval to the decision in *Vegeahn v. Guntner*, 167 Mass. 92. In that case a patrol of two men in front of the plaintiff's factory, maintained as one of the means of carrying out the defendants' plan, was held to be an unlawful interference with the rights of the employer and the employed. The patrolling or picketing of the premises was considered to have elements of intimidation, and the court decided that the motive of obtaining better wages for themselves on the part of the defendants did not justify maintaining a patrol in front of the complainant's premises as a means of carrying out their conspiracy. The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing, by a labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and

the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation and an unwarrantable interference with their rights. Pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance."

In the *Kemp* case, *supra*, nonunion employees filed a bill against union employees to restrain the union and its officers from calling a strike of its members, the purpose of the injunction being to prevent the union employees of the street railway company from quitting their employment in accordance with a vote previously taken by them. The injunction was denied for the reason as stated by Mr. Justice Carter (p. 252) that it would be, "in effect, to compel them to continue in their employer's service unwillingly."

In *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*, the defendants were enjoined, "from congregating upon or about the company's premises or the sidewalk, streets, alleys or approaches adjoining or adjacent to or leading to said premises, and from picketing the said complainant's places of business or the homes or boarding houses or residences of the said complainant's employees." In passing on this provision of the decree, Judge Baker, speaking for the United States Court of Appeals, said (p. 51): "With respect to picketing as well as persuasion, we think the decree went beyond the line. The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persua-

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sion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of persuasion and picketing, as such, should not be included in the decree."

Cases from other jurisdictions have been cited which hold that peaceful picketing is not unlawful, but so far as we have been able to ascertain, the law in this State in reference to picketing as announced in the *Barnes* case, *supra*, has not been changed. The evidence shows that the pickets in patrolling the street stated that there was a strike on at Henrici's. A strike is defined to be: "A combined effort by workmen to obtain higher wages or other concessions from their employers, by stopping work at a preconcerted time." (*Bouvier's Law Dict.*) "The act of a body of workmen employed by the same master, in stopping work all together at a prearranged time, and refusing to continue until higher wages, or shorter time, or some other concession is granted." (*Black's Law Dict.*) "A concerted or general quitting of work by a body of men or women for the purpose of coercing their employer in some way, as when higher wages or shorter hours are demanded, or a reduction of wages is resisted; a general refusal to work as a coercive measure." (*Century Dict.*) In the case at bar, we are clearly of the opinion that there was no strike as a matter of fact. So far as the evidence shows, none of the complainant's employees had made any complaint (before the resolution was passed by the unions calling the strike) as to the amount of wages, number of hours worked, or any other matter, nor did any of the waitresses quit their employment on account of the

calling of the strike; and made no complaint at any time and, therefore, the statements as made by the pickets, "There is a strike on at Henrici's," "We want \$8 for six days' work," "Don't eat under police protection," were not justified by the facts, and these, together with the patrolling, constituted picketing which tended unlawfully to interfere with complainant's business and was therefore properly enjoined.

Counsel for both parties contend that the decree is ambiguous, in that the rights of the parties are not clearly defined. The decree enjoins picketing and patrolling the complainant's place of business and then qualifies the same by the following language: "In such a manner as to intimidate, threaten or coerce any person or persons from entering or who may desire to enter said premises for the purpose of patronizing the Complainant, or for any lawful purpose whatsoever." In this qualification the court erred. We are of the opinion that under the facts in this case, the manner of picketing as shown by the evidence was not justified and should be enjoined. The decree will, therefore, be modified by striking therefrom the following words: "In such a manner as to intimidate, threaten or coerce any person or persons from entering or who may desire to enter said premises for the purpose of patronizing the Complainant, or for any lawful purpose whatsoever," and as so modified the decree of the Circuit Court is affirmed.

Decree modified and affirmed.

MR. JUSTICE GOODWIN concurring in part and dissenting in part.

Unfortunately, I feel constrained to dissent from the conclusions of the court in this case, so far as they result in a modification of the decree entered in the Circuit Court. Upon the disputed questions of fact I must, of course, concur in holding that as the learned chancellors saw and heard the witnesses, and as their

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findings in regard to the facts can in no way be said to be clearly against the weight of the evidence, they are binding on this court.

Upon the question as to whether picketing or patrolling is ever lawful, however, I am persuaded that the reasoning of the distinguished jurist in *Iron Molders' Union v. Allis-Chalmers Co.*, discussed in the opinion of the court, is correct. Certainly picketing, as applied to a labor controversy, has no definite and precise meaning; consequently judges differ in regard to the question of whether picketing is absolutely and unqualifiedly unlawful, to just the extent to which they differ as to the meaning of the term. There does not appear to be a difference in regard to any substantive principle of law expressed in the opinions in the *Barnes* case, *supra*, and in the case of *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*, but rather a difference in regard to the meaning of a term employed in the respective decrees. Both emphatically agree that the stationing of men for purposes of violence and intimidation should be enjoined; in the first, the position is taken that the term "picketing" necessarily includes an intention to intimidate; in the second it is held that it does not. While it seems preferable to avoid the use of a term of such inexactness, the decree does, nevertheless, by the addition of the qualifying words (which are rejected by the majority of this court) give it the definiteness and exactness of expression which, in my opinion, the law requires. The criticism of the decree urged by both sides on account of the general language employed, however, appears to be not without some justification. In view of the volume of evidence taken, it would seem that it was possible for the chancellors to define and describe with great particularity the exact character of the acts to be enjoined. This was a matter of perhaps greater importance to the defendants than to the complainant.

It appears, nevertheless, that the language used was

sufficiently clear to inform the defendants in the present instance, at least, of what was prohibited, and that did not go beyond what was justified by the findings of fact which, as we have already indicated, we are not at liberty, under the law, to disregard. So far as complainant is concerned, on the other hand, the decree gave it a full measure of protection against unlawful interference with its business, which was all that it was entitled to. It had no right to have that protection expressed in any particular phraseology. For these reasons I believe that the decree should be affirmed without modification.

Aaron Anderson, Defendant in Error, v. H. A. Reiter, trading as H. A. Reiter & Company, Plaintiff in Error.

Gen. No. 21,049. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action by Aaron Anderson, plaintiff, against H. A. Reiter, trading as H. A. Reiter & Company, defendant, to recover commissions on the sale of real estate.

The case was tried before the court without a jury, and to reverse a judgment for \$92.50 in favor of the plaintiff, the defendant prosecutes this writ of error.

The defendant is a real estate broker, and as such sold certain real estate on behalf of the plaintiff. Of the purchase price, \$200 was paid to the defendant by the purchaser, which the defendant claimed as his commission. Plaintiff contended that the defendant's

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commission was to be two and one-half per cent. of the selling price, or \$107.50, and therefore \$92.50 of the amount paid to the defendant belonged to the plaintiff. The evidence tended to show that the plaintiff called at the defendant's office June 2, 1914, in reference to the sale of the real estate. The defendant and his salesman Karrer were present. The amount of commission which the defendant was to charge was discussed.

The plaintiff testified that the defendant said his commission would be \$200; that the plaintiff said this was too much, and that he would only pay \$100; that the defendant said that \$100 was not even two and one-half per cent.; that thereupon plaintiff said if defendant would not take two and one-half per cent. he (plaintiff) would not sign the contract; that the defendant said, "Well, I guess we will have to take that," and that then the plaintiff signed the contract for the sale of the property for \$4,300; that later the deal was closed at Kransz's office, and that he then asked the defendant where the \$200 deposit was, and the defendant stated that Mr. Karrer had it; that on the afternoon of the same day plaintiff went to the defendant's office and met Mr. Karrer and asked him for the difference between \$200 and two and one-half per cent. of the selling price, which was refused on the ground that the commission agreed upon was \$200.

The defendant and his salesman both testified that a few weeks prior to the time in question, they had sold for the plaintiff a flat building; that the plaintiff received as part of the consideration for said flat building the piece of real estate above referred to; that in that deal the defendant wanted \$400 commission, which the plaintiff refused to pay, but finally agreed to pay \$300, and further stated that if the defendant sold the real estate mentioned in the contract above referred to he would pay \$200 commission; that in that transaction the plaintiff signed a written agreement to pay the defendant \$300; that on June 2nd, when the plaintiff

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called at the defendant's office, he asked what commission the defendant was to charge and was informed that it would be \$200 as the plaintiff had theretofore agreed; that the plaintiff said he would not pay that amount; that he first said he would pay \$80, then \$100, and then two and one-half per cent. of the selling price; that thereupon the defendant stated that he would sell to the prospective purchaser a piece of property owned by another person in lieu of the plaintiff's property; that the plaintiff then said, "Well, all right, draw up the contract, and I will pay the \$200;" that the defendant then drew up the contract which was signed. The amount of the commission, however, was not written in the contract. Defendant further testified that after the deal was closed at Kransz's office, plaintiff said, "Don't I get any of that \$200"; and defendant said, "Mr. Karrer has that, I haven't"; that on the afternoon of the same day, plaintiff called at defendant's office and there met Mr. Karrer and demanded the \$92.50, which was refused.

CASWELL & HEALY, for plaintiff in error.

HARRY BROWN, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 88*—*when evidence sufficient to support verdict in action for commissions.* Evidence in action by real estate broker for commissions examined and held to support the verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Glende v. Spraner, 198 Ill. App. 584.

Edward A. Glende, Plaintiff in Error, v. H. Spraner, trading as Wicker Park Garage, Defendant in Error.

Gen. No. 21,061. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Action of fourth class in Municipal Court of Chicago by Edward A. Glende, plaintiff, against M. Spraner, trading as Wicker Park Garage, defendant, to recover damages for the loss of a motorcycle valued at \$225. The case was tried before the court without a jury, and the issues were found against the plaintiff, a judgment was entered against the plaintiff for costs, to reverse which he prosecutes this writ of error.

The evidence showed that the defendant was the owner and proprietor of the Wicker Park Garage. The plaintiff was the owner of the motorcycle involved in this case. On the afternoon of May 31, 1914, plaintiff and another were riding said motorcycle and, as they were nearing defendant's garage, the drive chain of the motorcycle broke, and plaintiff then pushed the motorcycle into defendant's garage to repair the chain. He worked for some time but was unable to fix the chain, and, a storm having arisen in the meantime, plaintiff decided to leave the motorcycle in the garage over night, which he did with the permission of the defendant. The plaintiff stated that he would call for it the next day. Some time during the next day, a man called at defendant's garage and presented a written order signed by the plaintiff directing the defendant to "give this gentleman permission to inspect" the motorcycle. Defendant complied with plaintiff's direc-

tions, and while the man was inspecting the motorcycle he mounted it and rode away. Plaintiff arrived at the garage immediately after the man had gone and demanded the motorcycle. He was told that the motorcycle had been delivered to the man who presented plaintiff's written order; that he had just left with it, and would probably be back in a few minutes. Plaintiff waited around the garage for a while, but the man did not return, and plaintiff was never able to recover possession of his motorcycle.

The plaintiff contended that there was an express contract by which he agreed to pay the defendant fifty cents for keeping the motorcycle over night, and that therefore the defendant was a bailee for hire. The defendant denied that there was any such agreement, and contended that he permitted the plaintiff to leave the machine as an accommodation and that he was a mere gratuitous bailee.

HENRY J. KRAMER, for plaintiff in error.

JACOB C. LE BOSKY, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 5*—*when evidence sufficient to show keeper of garage gratuitous bailee.* In an action against the proprietor of a garage for the loss of a motorcycle, evidence examined and held sufficient to sustain a finding that defendant was a gratuitous bailee.

2. AUTOMOBILES AND GARAGES § 5*—*when garage keeper storing vehicle liable as gratuitous bailee.* The keeper of a garage who stores a vehicle over night to accommodate its owner and without agreement as to compensation is a mere gratuitous bailee and is liable for gross negligence only, or a want of slight care or diligence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. AUTOMOBILES AND GARAGES, § 5*—*when garage keeper exercising ordinary care not liable for loss of stored vehicle.* A garage keeper who, for compensation, stores a vehicle for the owner is not liable for its loss by theft, if he exercised ordinary care to prevent it.

4. BAILMENT, § 27*—*when burden of proof on bailee and when on bailor in action for loss of bailment.* In an action by a bailor against a bailee to recover damages for the loss of the bailment, where plaintiff shows the delivery of the bailment to defendant and the failure of defendant to make redelivery, the burden is on defendant to show the exercise of the degree of care required by the nature of the bailment; but where it appears that the bailment was lost, stolen or destroyed by fire, the burden of proving negligence is on the plaintiff.

5. AUTOMOBILES AND GARAGES, § 5*—*when garage keeper not liable for theft of motorcycle.* In an action against a garage keeper to recover for the loss of plaintiff's motorcycle, where the evidence shows that plaintiff had left the machine in defendant's garage overnight, that he had advertised it for sale and had so informed defendant, also informing the latter that the machine could not be operated until repairs were made, and had left his name and address with defendant and had requested the latter to permit any one to inspect the machine whom he might send around, defendant is not liable for the theft of the machine by one who presented a written permit from plaintiff to inspect and, under the pretext of inspecting it, stole it, riding it away.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Oscar Metz and Bertha Metz, Appellees, v. Oscar Brodfuehrer and Henrietta Newton, Appellants.

Gen. No. 22,132. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court. Affirmed. Opinion filed April 12, 1916.

Statement of the Case.

Bill by Oscar Metz and Bertha Metz, complainants, against Oscar Brodfuehrer and Henrietta Newton, defendants, to remove clouds and for an accounting. From an order denying a motion to dissolve a preliminary injunction, heard on the face of the verified amended bill, defendants appeal.

The bill alleged that complainants, on January 8, 1913, purchased property known as 2161 Leland avenue, Chicago, and paid for the same; that the property is improved with a two-story brick building; that the complainant, Oscar Metz, in 1907, employed the defendant, Oscar Brodfuehrer, as his agent to look after some real estate matters; that the complainants from time to time purchased different parcels of real estate and were represented in said transactions by said Brodfuehrer; that the latter continued to act in said capacity from 1907 until the filing of the bill in this case; that since the purchase of the Leland avenue property the same has been occupied by tenants; that the defendant Brodfuehrer as agent for the complainants has collected the rents from such tenants; that the defendants conspired to cheat and defraud the complainants out of said property and in furtherance of said conspiracy, on or about the 11th day of September, 1913, forged the complainants' names to a trust deed to said premises, purporting to secure an indebtedness of \$1,000; that the said trust deed is a

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forgery and should be removed as a cloud; that afterwards, on or about April 25, 1914, the defendants in furtherance of said conspiracy to cheat and defraud the complainants out of said property forged the complainants' names to a warranty deed conveying the Leland avenue property; that said deed was filed for record in the recorder's office, Cook county, Illinois, on August 10, 1915; that the recorder of Cook county is about to deliver said warranty deed to the defendants; that the only way that complainants can show that said warranty deed is a forgery is by producing the original in court; that from 1907 to the time of the filing of the bill the defendant Brodfuehrer collected rents for the complainants derived from several different parcels of real estate in Chicago and has failed to properly account for the same. The bill prays for an accounting; that the trust deed and warranty deed be removed as clouds; that the recorder be enjoined from delivering the warranty deed, and that the defendants be enjoined from attempting to exercise any acts of ownership over the property, etc., and for general relief.

The defendants contended that this being a bill to remove clouds, and the premises in question being improved, an allegation that the complainants are in possession was essential, and that the bill as amended contained no such allegation, and was therefore fatally defective.

They also contended that to warrant an injunction on the face of a bill it must be verified, and that the verification to the amendments to the bill was insufficient. The affidavit was as follows: "Oscar Metz being sworn states upon oath he has heard read the above and foregoing amendment and knows the contents thereof and that the statements therein made by him and complainants are true and he subscribed his name to the same." The objections urged to this were that this affidavit which appeared at the foot of the docu-

ment, consisting of eleven different amendments to the bill, referred to but one amendment, and therefore it was impossible to determine to which amendment affiant referred; that the word "statements" as used in the affidavit was ambiguous and that no distinction was made between matters stated positively and those upon information and belief.

ROMAN G. LEWIS, for appellants.

A. L. WILLIAMS, for appellees.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 269*—*when motion to dissolve treated as demurrer.* When a motion to dissolve a preliminary injunction comes on for hearing on the face of a verified amended bill, it must be treated as a demurrer to the amended bill and the case decided upon the face of the same.

2. EQUITY, § 242*—*what proper practice on filing amendments to bill.* Where, after a bill is filed, complainants, by leave of court, make a number of amendments, the better practice is to require that an engrossed bill be filed.

3. QUIETING TITLE, § 61*—*when allegation of possession essential in bill.* On a bill to remove clouds, where the premises are improved, an allegation that plaintiffs are in possession is essential.

4. QUIETING TITLE, § 61*—*when allegation as to possession sufficient.* On a bill to remove clouds, allegations of bill examined and held to aver that complainants were in possession.

5. EQUITY, § 271*—*when verification of amendment to bill sufficient.* An affidavit to the amendments to a bill to remove clouds affixed at the foot of the single document containing the amendments, which recites that one of the complainants "being sworn states upon oath he has read the above and foregoing amendment and knows the contents thereof and that the statements therein made by him and complainants are true and he subscribed his name to the same," is sufficient.

6. QUIETING TITLE, § 75*—*when order impounding rents with clerk of court not equivalent to appointment of receiver.* On a bill

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to remove a cloud, where the allegations of ownership in fee of the property by complainants and that they are entitled to the rent therefrom are on the record admitted to be true, an order impounding the rents with the clerk of the court until the final disposition of the cause is not equivalent to the appointment of a receiver, requiring complainants to give bond.

7. QUIETING TITLE, § 75*—*when order impounding rents with clerk not injurious to defendant.* On a bill to remove clouds, where the bill avers that complainants are owners in fee simple of the property; that they are in possession and entitled to the rents derived from the same, and on the record such allegations are admitted to be true, no injury is done defendants by an order impounding the rents with the clerk of the court until the final disposition of the cause, especially where no objection was made to the impounding of the rents.

**S. D. Childs & Company, Appellee, v. City of Chicago,
Appellant.**

Gen. No. 22,381.

1. EMINENT DOMAIN, § 42*—*when structure for use in connection with municipal bridge not additional servitude.* A power plant placed by a city in a pit in the street for the purpose of operating a bascule or "jack-knife" bridge over a navigable river is not an additional servitude, but essentially a part of the bridge.

2. EMINENT DOMAIN, § 51*—*when payment of compensation not condition precedent to exercise of power.* Even though it is admitted that a proposed structure and change of grade in a street in connection with the erection of a municipal bridge over a navigable river will damage adjoining property, the ascertainment and payment of such damages is not a condition precedent where no part of the property is taken, irrespective of the hardship which may be entailed thereby.

3. EMINENT DOMAIN, § 40*—*when remedy of owner of damaged property an action at law.* The remedy of one whose property suffers consequential damage by a public improvement in a street is by an action at law.

4. MUNICIPAL CORPORATIONS, § 874*—*when existence of street suf-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ficiently shown. On a bill to enjoin the erection of structures in a street in connection with a bridge over a navigable river, the existence of a public street *held* sufficiently shown.

5. MUNICIPAL CORPORATIONS, § 883*—*when erection of bridge connecting parts of street enjoined.* On a bill by a property owner to enjoin a municipality from erecting a bridge and approach over a navigable river and connecting parts of a street, which is to be built in part on complainant's property, defendant will be enjoined from erecting such structures until it has obtained the right to do so by condemnation or otherwise.

ADDITIONAL OPINION ON PETITION FOR REHEARING.

MUNICIPAL CORPORATIONS, § 883*—*when access to property not destroyed by proposed improvement.* Evidence on bill to enjoin erection of bridge by city, examined and *held* to show that the proposed improvement would not cut off all access to or egress from complainant's property.

Interlocutory appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court. Reversed and remanded with directions. Opinion filed April 12, 1916. Rehearing denied and additional opinion filed May 17, 1916.

SAMUEL A. ETTIELSON, for appellant; ANTON T. ZEMAN and CHESTER E. CLEVELAND, of counsel.

EDMUND S. CUMMINGS and LEE D. MATHIAS, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from an interlocutory order enjoining the defendant, City of Chicago, from proceeding with the construction of a bridge across the Chicago River at Monroe street, until the damages have been ascertained and compensation paid. The parties will hereafter be designated complainant and defendant as in the court below.

The cause was heard upon the verified bill supported by affidavits and the verified answer supported by affidavits. Monroe street extends east and west in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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City of Chicago and exists by virtue of a common-law dedication. It was dedicated and laid out about seventy-five years ago and has continuously, since that time, been a public street. It is intersected by the Chicago River, which is a navigable stream. The defendant city has made plans and let the contract for building a bridge across the river on said street. The complainant is the owner of a leasehold estate, which expires April 30, 1919, in the property abutting on the north side of Monroe street and adjacent to the river. The property faces one hundred feet on Monroe street and ninety-nine feet on the river, and is improved by an eight-story mill constructed building, built of brick and stone. A dock eight feet in width extends along the river. As constructed, the building is adapted to the established grade of Monroe street. The only entrance to the building is from Monroe street at the southwest corner of the same. The elevators and stairways are likewise located in the southwest corner. The building is used by complainant and its subtenants for manufacturing purposes, and has been so used since it was built, May 1, 1904. The only means of ingress to and egress from the several floors of the building is by the elevators and stairways. In the construction of the bridge, the city is about to raise the grade of Monroe street abutting complainant's premises fourteen feet on the west and eleven feet on the east line of the same. The bridge to be constructed is of the jack-knife or bascule kind. For the purpose of operating and maintaining the bridge, the city is about to build in the street a concrete pit thirty-five feet in depth, abutting the west forty feet of complainant's premises, and extending practically the entire width of the street. The city intends to install and maintain in the pit motors, machinery and other devices to operate and control the bridge. The plans provide that when the bridge is complete, steel arms or girders will extend twelve feet above the surface of the

street at the curb, abutting the west forty feet of complainant's premises when the bridge is closed, and when it is opened, the arms or girders of the bridge move in the pit and extend upwards perpendicularly in front of complainant's property to a height of about eighty feet, and cut off all access to or egress from the west forty feet of the premises.

The complainant contends that the fee of the street being in the abutting property owners, the city has no right to put an additional burden upon the fee, without first obtaining the right to do so and paying compensation therefor; and that the city has not obtained such right. The argument is that the additional burden on the fee of the street is not by reason of the construction of the approach to the bridge, but by the construction of the pit in the street and the power plant in the pit; that the only right the city has in Monroe street is the easement to use the street for the purpose of travel along the street and of access to the adjoining property; that both the construction of the pit and the power plant "relate to the prevention of travel upon the street," and that, therefore, the pit and the power plant constitute an additional burden upon the fee. It is conceded that if the construction of the bridge as proposed constitutes an additional burden upon the fee in the street, and the city has not obtained the right to do so from the abutting property owners by condemnation or otherwise, it has no right to construct the bridge; but it is contended that the digging of the pit and the building of the power plant therein does not constitute such additional burden, but that they are essential parts of said bridge and that when completed the bridge will facilitate traffic in Monroe street, for which purpose the street was dedicated. After a careful consideration of all the facts as disclosed by the record, and in the light of all the authorities, we are clearly of the opinion that the power plant proposed to be constructed in the pit is as essentially

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a part of the bridge as the plank to be laid in the floor of said bridge, and therefore it does not constitute an additional burden upon the fee in the street.

The complainant next contends that a court of equity will enjoin the damaging of property until compensation therefor is determined and paid, where it is admitted that the property will be damaged by the construction of the improvement, regardless of whether the same imposes an additional burden upon the fee in the street; that it clearly appears the complainant's property will be damaged by the change in grade and the construction of the steel girders; that the parties have been unable to agree as to the amount; that the city should therefore be compelled to proceed under the Eminent Domain Act to have the damages ascertained and that this is true where the fact that the property will be damaged is admitted, although no property will be physically taken. In support of this contention complainant cites the cases of *Meyer v. Village of Teutopolis*, 131 Ill. 552, and *McElroy v. Kansas City*, 21 Fed. 257.

In the *Meyer* case, *supra*, an ordinance was passed by the village officials vacating a certain portion of a street in the village in the manner prescribed by chapter 145, Rev. St. (J. & A. ¶¶ 11485, 11486). The village then filed its petition to have the damages to property, by reason of the vacation of said street, ascertained and assessed. It was contended on behalf of the property owners that the ordinance was void, as the street was vacated at the instance of and for the benefit of a private corporation. The contention was held untenable. In that case no question was raised as to the proper procedure, and furthermore the village officials were proceeding under the law as provided in chapter 145, Rev. St., which has to do with the vacation of streets.

In the *McElroy* case, *supra*, it was held, under a constitutional provision similar to ours, which provided

private property should not be taken or damaged for public use without just compensation, that where private property was damaged for public use compensation must first be ascertained and paid, and this, too, although no property was physically taken.

It would serve no useful purpose to discuss this or the other authorities cited by the complainant on this proposition, for the Supreme Court of this State has many times passed squarely upon the question now under consideration, adversely to complainant's contention. In *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, the court, in sustaining the dismissal of a bill for injunction, say (p. 165): "While private property cannot be taken by public authority for private use, it may be taken or damaged for a public use upon payment of just compensation to be ascertained by a jury in the mode prescribed by law. (Const., sec. 13, art 2.) It seems to be well settled in this State, that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement, and the damages claimed to result are therefore consequential, only, this provision of the constitution does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power. *Stetson v. Chicago and Evanston Railroad Co.* 75 Ill. 76; *Patterson v. Chicago, Danville and Vincennes Railroad Co.* id. 588; *Scherts v. Peoria and Rock Island Railroad Co.* 84 id. 135; *Pennsylvania Mutual Life Ins. Co. et al. v. Heiss et al.*, 141 id. 35."

To the same effect is *County of Mercer v. Wolff*, 237 Ill. 74, where it is said (p. 76): "No part of the premises of the cross-petitioners was sought to be taken. No direct physical damage to their property was contemplated. The damages to be sustained, if any, were entirely consequential. For such actual damages, though consequential only, as may be sustained by an owner of abutting land through the taking of adjoin-

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ing premises for a public use a remedy is given, and the owner may have his compensation ascertained by a jury, as required by the constitution in a common law action. But when no part of the land of an abutting owner is taken the constitution does not require the ascertainment and payment of his consequential damages before entry can be made upon adjoining property. Damages resulting to an abutting proprietor, no part of whose land is physically taken, are not within the contemplation of the Eminent Domain Act, but he is remitted to his action at law for his damages."

Complainant's damages by reason of the change in the grade of the street and the construction of the pit and power plant therein being entirely consequential, it has its remedy in an action at law.

Complainant further contends that the court had jurisdiction to issue the injunction, in that the damages are irreparable and that there is no adequate remedy at law. It is conceded that it will cost the complainant at least \$37,500 to open a new entrance to the building and rearrange the elevators and stairways, and that this must be done before the building can be of any use. The complainant further contends that it is financially unable to make such alterations; that it will be compelled to pay a rental of \$13,000 per year; that tenants occupying the upper floors of the building, who sublease from the complainant, will move out; that the complainant will likewise be compelled to vacate the premises and move its machinery; that the construction of said improvement will interrupt its business, and that all these elements of damage complainant will be unable to recover, because it says they are *damnum absque injuria*. But the complainant argues that if such damages as are legally recoverable are first ascertained and paid it will not be compelled to suffer any of such losses because it will then be financially able to make all necessary alterations. The answer to this contention is that the court can im-

pose no condition on the city that the law does not authorize, and as we have already said, the law does not require that the city first pay complainant its damages before proceeding with the work.

A suggestion is made by the defendant that Monroe street does not exist between the west bank of the Chicago River and Canal street, which is a distance of several hundred feet. There is no allegation to this effect in complainant's bill. The contention is, however, set up in an affidavit in support of the bill. Complainant has made no point of this in its brief and has but incidentally referred to it in its preliminary statement of the case. The defendant's answer expressly avers that Monroe street is a continuous street from Michigan Boulevard on the east to South Central avenue on the west, a distance of about seven miles. Under the circumstances, we are of the opinion that there is a sufficient showing that Monroe street exists as a street throughout its entire length, including that portion between the river and Canal street.

Complainant further contends that it clearly appears from the record that the city intends to construct a bridge tender's house upon its dock; that the right to do so has not been given to the city and therefore the court properly entered the order for injunction. On the other hand, the city contends that it has no intention of constructing the bridge tender's house until it has acquired the right to do so by contract or condemnation.

The city admits that in connection with the bridge, if it can procure the right to do so by negotiations or condemnation proceedings, it desires and intends ultimately to construct at or near the southerly end of said dock a concrete and steel structure, about twenty feet in height and eight feet in width, to be used as a bridge house, in connection with the operation of said bridge when completed; that the complainant has not consented to the erection of such structure, and the city

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has not acquired such right by condemnation or otherwise; that the city has no right to use the dock and has no intention of so doing, unless and until it acquires such right. From the foregoing, it clearly appears that the city intends to construct upon the complainant's dock a bridge tender's house; that it has not acquired the right to do so; that such house will be used in connection with the operation of such bridge; that the bridge cannot be operated without it, and that it is an indispensable part of the bridge. The city is authorized to change the grade in Monroe street in front of complainant's premises and to construct the bridge, for the sole reason that the bridge when constructed will be a part of Monroe street, so that traffic may pass freely over the same, as contemplated when the street was dedicated, and unless the bridge can be operated it will be of no use or benefit to the public. Before the city should be permitted to construct the bridge in the manner proposed, it should first clearly appear that it has authority to make a complete bridge, either through the right to use complainant's dock or other means by which the bridge may be operated, and as the record shows that it has no such authority, it should be enjoined until such authority is shown.

The injunction order entered in this case, however, is too broad. The order will, therefore, be reversed and the cause remanded with directions to enter an order enjoining the defendant from proceeding with the construction of the bridge or the approach thereto in front of complainant's property until the city has obtained the right to construct a bridge which will subserve the purpose for which Monroe street was dedicated. Each party will be required to pay its own costs in this court.

Reversed and remanded with directions.

ADDITIONAL OPINION BY MR. JUSTICE O'CONNOR ON
PETITION FOR REHEARING.

A petition for rehearing has been filed in this case. Before preparing the opinion we made a careful examination of the entire record. Since the filing of the petition we have again carefully examined the record, and are clearly of the opinion that the conclusion originally reached was correct, and that a rehearing should be denied. However, counsel for complainant strenuously insist that we have overlooked several important and controlling principles in the case. We think, therefore, that we should say something further in reply thereto.

In the petition counsel state that the "opinion *concedes* that the proposed improvement cuts off ALL ACCESS to and egress from the west forty (40) feet of the complainant's property and that the steel girders or arms of the bridge will extend twelve (12) feet above the surface of the curb when the bridge is closed. The court, however, has failed to give due consideration to the fact that the complainant as an abutting property owner has an INDEFEASIBLE RIGHT of access to and egress from its property which, while it may be temporarily interfered with, cannot be permanently destroyed. The court has also entirely overlooked the fact that the highway is dedicated AS MUCH FOR MEANS OF ACCESS TO AND FROM THE ABUTTING PROPERTY as to public travel along the same and that the taking away of this right from the abutting property owner is as much a *taking* of his property right as is the closing up of the street itself."

The contention of counsel as above quoted is based on a misapprehension. All access to and egress from the west forty feet of the property is not cut off by the proposed improvement. The property is located on the north side of Monroe street, adjacent to the river, and extends one hundred feet on Monroe street and ninety-nine feet on the river, and is improved by an

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eight story building. The only entrance to the building is from Monroe street at the southwest corner, and within said forty feet. Likewise the elevators and stairways are located in this corner of the building. These stairways and elevators furnish the only means of access to the several floors of the building, and complainant contends that it will cost about \$50,000 to open a new entrance to the building and rearrange the elevators and stairways, said entrance and stairways to be located in the southeast corner of the building; that if this were done complainant would not lose its tenants and could make use of the entire building. From this it clearly appears that all access to and egress from the west forty feet of the property will not be cut off by the proposed improvement.

Counsel also say that "a municipality has no right to so obstruct its streets as to deprive property owners of free access to and from their lots adjoining." In support of this contention, complainant cites, among other cases, *Stack v. City of East St. Louis*, 85 Ill. 377. That was an action on the case for damages to real estate occasioned by the city's authorizing and permitting a bridge company to build an approach to a bridge in front of Stack's property, which rendered the street permanently useless and obstructed Stack's ingress to and egress from his property and caused water to flow and drain upon the land, so that the cellars upon the property were filed with surface water, etc. A demurrer was sustained to a declaration setting up these facts. The Supreme Court reversed the case, holding that the plaintiff was entitled to recover his damages. This is precisely the position we take. Complainant has an adequate remedy at law to recover any legal damages it may sustain. Whether the city proceeds under the Eminent Domain Act or the complainant brings its action on the case, the damages will be precisely the same, the only difference being that in the former the damages must first be ascertained and paid,

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while in the latter the damages will be assessed after the bridge is constructed. The wisdom or unwisdom of this method for compensating property owners whose property is damaged for public use is not a question for the courts.

Complainant has raised other points in its petition for a rehearing, which we have carefully considered, but deem it unnecessary to refer to them here, as the same are fully covered in the original opinion. A rehearing will be denied.

Rehearing denied.

William Dorothy, Trustee, Appellant, v. Commonwealth Commercial Company and Northern Trust Company, Appellees.

Gen. No. 20,870. (Not to be reported in full.)

Appeal from the Superior Court of Cook county. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed April 17, 1916.

Statement of the Case.

Bill by William Dorothy, trustee in bankruptcy of R. K. Maynard Piano Company, a corporation, bankrupt, complainant, against Commonwealth Commercial Company and Northern Trust Company, defendants.

Complainant filed a bill for the redemption of certain accounts, notes, contracts and papers in the possession of the defendant Commonwealth Commercial Company, which it is alleged were delivered to said defendant as collateral security for loans of money made by this defendant, to the R. K. Maynard Piano Company, of which complainant, William Dorothy, is trustee in bankruptcy. The bill prayed for an accounting and asked that upon payment of the amount found due from the Maynard Company all its indebtedness to the Commonwealth Company be declared extinguished and

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that said accounts, notes, etc., be delivered to complainant and decreed to belong to the Maynard Company and to complainant as trustee for the same. Upon hearing by the chancellor the bill was ordered dismissed for want of equity. From this, complainant appeals.

The transfer of the accounts, notes, etc., from the Maynard Company to the defendant was effected under four contracts. Complainant contends that these contracts, rightly construed, show the transaction to be a transfer of collateral as security for loans. The defendant Commonwealth Company contends that they are what in form they appear to be—bona fide sales.

ATWOOD, PEASE & LOUCKS, for appellant.

ZANE, MORSE & MCKINNEY, for appellees.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 1*—*when agreement a loan and not a sale.* Transaction in suit held to constitute a loan, and the accounts, notes, contracts and papers involved therein to be collateral security, following *Mercantile Trust Co. v. Kastor*, 273 Ill. 332.

2. CONTRACTS, § 203*—*when dealings between parties a continuous transaction.* On a bill to redeem certain accounts, notes, contracts and papers, dealings between plaintiff and defendant examined and held to constitute a continuous transaction.

3. CONTRACTS, § 203*—*when dealings between parties a continuous transaction.* The continuous character of a transaction is not affected by the fact that yearly contracts were entered into between the parties which bore no relation to particular periods of time and were merely incidental to the continuous business.

4. CONTRACTS, § 157*—*when return of consideration received under ultra vires contract required.* On a bill to redeem accounts,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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notes, contracts and papers claimed to have been deposited by complainant with defendant as collateral security for a loan, complainant who has received money under the contracts between the parties is not relieved from the obligation to account for and return it with legal interest by reason of the fact that such contracts were *ultra vires*.

CASES
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS,
DURING THE YEARS 1915 and 1916

**Lidgerwood Manufacturing Company, Appellee, v.
S. R. H. Robinson & Son Contracting Company, Ap-
pellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Madison county; the Hon. W. E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. Rehearing denied April 5, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by the Lidgerwood Manufacturing Company, plaintiff, against the S. R. H. Robinson & Son Contracting Company, defendant, in the Circuit Court of Madison county, to recover on certain notes and for goods sold and delivered. From a judgment for plaintiff for \$33,000.83, defendant appeals.

The opinion of the court in the previous appeal (183 Ill. App. 431) contains a copy of the contract and other material facts necessary to a clear understanding of the issues, with the exception of certain testimony relating to an alleged settlement which took place before the machinery, which was the subject of the contract,

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was completely set up. In regard to this G. N. Crawford, Sr., representing plaintiff, testified that on September 21, 1910, he inspected the excavators, and that at that time he found the two B-F excavators in actual operation, that the boilers and gears thereof were in good and proper operative condition and that the erection of the C excavator had not yet been completed. Nothing had been paid on the machines and Crawford requested a payment. On September 22nd, at the office of the latter in St. Louis, Missouri, the matter of a settlement was fully discussed. Robinson claimed that defendant had been at more cost in the erection of the machinery than was reasonable, and that it had suffered other damages. Crawford was willing to make some allowances, and as a result of the conference he allowed defendant and the latter accepted, as a credit upon the contract price, the sum of \$1,000 in settlement of all damages claimed to have been sustained up to that date. Thereupon Robinson paid plaintiff \$5,000 in cash and gave a note for \$5,000 due October 12, 1910, which has been paid, and also the note for \$5,000 and the three for \$3,333.33 each, sued on in this case. It was undisputed that the sum of \$1,000 was agreed upon in settlement of all claims for damages up to that date, but it was contended by plaintiff that such damages were agreed upon unconditionally, while the contention of defendant was that this settlement was made on the express condition that plaintiff would make the machines satisfactory and, if the old ones did not give satisfaction, would furnish new swinging engines, new gears and new boilers, if necessary, and if plaintiff failed to carry out this new agreement, the \$1,000 would not be accepted by defendant as the amount of damages it was entitled to. The only person present at that time, in addition to Mr. Crawford and Mr. Robinson, was Mr. Dentzer, the Secretary of defendant, who to a large extent corroborated Mr. Robinson and testified that Mr. Crawford absolutely agreed to furnish new boilers for the B-F excavators.

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Mr. Crawford testified there was no discussion about gears or boilers on that day, and denied that he agreed to furnish defendant any new boilers or swinging engines or gears upon any condition, and he was corroborated by certain facts and circumstances which would tend to establish the improbability of such a contract being made. In this connection it was shown by plaintiff, that at that time excavator C had not been completely erected and that defendant continued to and did complete the erection. Defendant afterwards demanded new boilers of plaintiff, but none were furnished and the job was completed with those first installed. In the month following the settlement, Mr. Crawford again visited the machines and stated he found them improperly cared for and operated. Subsequent to this visit one McMillen was sent down to overhaul them at plaintiff's expense, and the proof tended to show he left them in good repair. It also appeared that a new set of gears was furnished by plaintiff after the settlement was made, but the proof showed that they were of the same size and dimensions as the original bevel gears and were furnished as supply parts upon the order of defendant, and that plaintiff made a charge against defendant for them.

WARNOCK, WILLIAMSON & BURBROUGHS, for appellant.

BAKER & HOLDER and TERRY, GUELTIQ & POWELL, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*what weight given to finding of court.* Since a court sitting as a jury has the same opportunity of determining the credibility of witnesses and the same power as a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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jury of determining where lies the preponderance of the evidence, the same weight should be given by the Appellate Court to its finding as to the verdict of a jury.

2. SALES, § 328*—*when question whether new parts necessary for machinery for jury.* Where, in making an agreement of settlement of differences arising over contracts for certain machinery, the seller agrees to furnish new parts "if necessary," the question whether such parts are reasonably necessary is a question of fact.

3. SALES, § 329*—*when evidence sufficient to sustain finding that new parts for machine not necessary.* Where, in making an agreement of settlement of differences arising out of a contract for certain machinery, the seller agreed to furnish new parts "if necessary," evidence examined and held to sustain a finding that such parts were not necessary.

4. SALES, § 71*—*when seller not liable for difficulty in operating machines.* Where, in making an agreement of settlement of differences arising over contracts for the sale of machinery, the seller agrees to furnish new parts "if necessary," the seller is not liable for difficulty in operating the machines caused by the inexperience and neglect of the buyer's employees.

5. COMPROMISE AND SETTLEMENT, § 16*—*when evidence sufficient to establish unconditional settlement.* In an action to recover on notes given in settlement of differences arising over contracts for certain machinery, where the evidence was conflicting as to whether the settlement was dependent upon the plaintiff's making the machinery satisfactory or furnishing new parts if not satisfactory, or was unconditional, as plaintiff claimed, evidence examined and held to sustain a finding that the settlement was unconditional.

6. SALES, § 329*—*when evidence insufficient to show breach of contract.* In an action to recover on notes given in settlement of differences arising over contracts for certain machinery, where defendant claimed that the settlement was conditional on the performance of certain conditions, evidence examined and held insufficient to show such breach as would defeat plaintiff's claim.

7. APPEAL AND ERROR, § 1567*—*when errors in holding propositions of law harmless.* Where it is apparent on the whole record that a judgment entered by a court sitting as a jury is right, errors committed by it in holding propositions of law are harmless and not ground for reversal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wahlmann v. C. Becker Milling Co., 198 Ill. App. 608.

**Henry C. Wahlmann, Administrator of the Estate of
Victor Hahn, Deceased, Plaintiff, v. C. Becker Mill-
ing Company, Defendant.**

1. MASTER AND SERVANT, § 120*—*when superintendent of mill under no duty to install guards for machinery.* A superintendent in charge of machinery, in a mill, and who is injured, does not incur a penalty under the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees, for failure to install guards for machinery which he had not been directed by the master to place therein where the master was actively participating in and managing the business of the going concern, as the duty to install the machinery primarily lies upon the master.

2. MASTER AND SERVANT, § 302a*—*when assumed risk by servant no defense.* In an action to recover for the death of plaintiff's intestate while "doping" an unguarded pulley belt while it was in motion, the fact that deceased may have been negligent and assumed the risk of working at the machinery without guards does not relieve the employer from doing what is required of him by the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees, or relieve him from the penalty of the withdrawal of the defenses of contributory negligence and assumed risk.

3. MASTER AND SERVANT, § 430*—*when defense of contributory negligence unavailable.* The defense of contributory negligence of a servant is no defense to an action for injuries to an employee due to a violation of the statutory duty imposed by the Act of 1909 (J. & A. ¶ 5386 *et seq.*), to guard machinery.

4. MASTER AND SERVANT, § 302a*—*how act relating to health and safety of employees construed.* The Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees, is to be given the same construction as the Miners' Act (J. & A. ¶ 7475 *et seq.*), as to the defenses of assumed risk and contributory negligence.

5. MINES AND MINERALS, § 117*—*when defense of assumption of risk unavailable.* Assumed risk is unavailable as a defense in a suit for damages caused by a wilful violation of the Miners' Act (J. & A. ¶ 7475 *et seq.*).

6. MINES AND MINERALS, § 125*—*when contributory negligence no defense.* Contributory negligence is unavailable as a defense in a suit for damages caused by a wilful violation of the Miners' Act (J. & A. ¶ 7475 *et seq.*).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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7. MASTER AND SERVANT, § 706*—*when question whether injured employee was such superintendent as to be deprived of benefits of act relating to safety of employees is for jury.* The fact that a mill superintendent was receiving wages and not only looking after machinery but performing work which required him to pass near the machinery which injured him is such evidence that he was an employee that a court cannot say as matter of law that he was at the time such a superintendent as would deprive him of the benefits of the act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees.

8. MASTER AND SERVANT, § 706*—*when question whether injured superintendent was an employee entitled to benefits of act for safety of employees is for jury.* The question whether a mill superintendent who, when injured, is performing work as well as looking after machinery is an employee within the meaning of the Act of 1909 (J. & A. ¶ 5386 *et seq.*) is a question of fact for the jury under the instructions of the court.

9. MASTER AND SERVANT, § 171*—*what does not constitute repairing of machinery.* "Doping" pulley belts, in order to keep them from slipping, is not "repairing" them within the meaning of section 1 of the Act of 1909 (J. & A. ¶ 5386), relating to the health and safety of employees, providing that "no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion."

10. WORDS AND PHRASES, — *word "repair" defined.* The word "repair" means "to restore to a sound or good state after decay, injury, dilapidation or partial destruction."

11. MASTER AND SERVANT, § 716*—*when question whether necessary to stop machine before doping belts for jury.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" an unguarded pulley belt while it was in motion, it is a question of fact for the jury, under proper instructions, whether in the practical operation of the particular machinery it was necessary to stop the machine before applying the "dope."

12. MASTER AND SERVANT, § 158*—*when necessary to guard machinery in mill where pulley belts "doped" in action.* Under section 1 of the Act of 1909 (J. & A. ¶ 5386 *et seq.*), requiring that "all dangerous places in or about * * * mills * * * near to which any employee is obliged to pass, or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded," where it is not necessary that machinery be stopped before applying "dope" to pulley belts to prevent their slipping, such machinery must be guarded or fenced so as to offer the least possible chance for injury to those operating it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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13. MASTER AND SERVANT, § 501*—*when failure of servant to stop machinery to dope belts no defense.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" an unguarded pulley belt while it was in motion, an employer is not allowed to defend on the ground that deceased should have stopped the machinery before "doping" the belt, although section 1 of the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees, provides that "no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion."

14. MASTER AND SERVANT, § 795*—*when instruction that if deceased is superintendent of mill no recovery could be had properly refused.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" unguarded pulley belts while they were in motion, an instruction that if deceased was the head miller or superintendent of defendant's mill he could not recover, is properly refused where his management is subject to the control of the operators of the mill and where it was also part of his duties to work in the mill as a miller, in which case deceased is not deprived of the benefit of the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees.

15. MASTER AND SERVANT, § 797*—*when instruction on assumed risk properly refused.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" a pulley belt while it was in motion, an instruction presenting the question of assumed risk is properly refused, since such defense is taken away from the employer by the Act of 1909 (J. & A. ¶ 5386 *et seq.*).

16. MASTER AND SERVANT, § 800*—*when instruction that if guards insufficient to protect deceased no recovery could be had properly refused.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" an unguarded pulley belt while it was in motion, an instruction that if the guards mentioned in the instruction would have been insufficient to protect deceased while so engaged plaintiff could not recover is properly refused, such instruction practically informing the jury that they must find for defendant unless the guards would furnish absolute protection to those working around the machinery.

17. MASTER AND SERVANT, § 130*—*when master may not delegate duties.* The duties imposed by the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees and the guarding of machinery, cannot be delegated by the employer.

18. MASTER AND SERVANT, § 800*—*when instruction that danger from machinery must be entirely eliminated properly refused.* In an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" an unguarded pulley belt while it was in motion, an instruction requiring that danger from the machinery be entirely eliminated is properly refused under the Act of 1909 (J. & A. ¶ 5386 *et seq.*), relating to the health and safety of employees, in that such instruction ignores the question of the practical operation of the machinery.

19. MASTER AND SERVANT, § 800*—*when instruction defining meaning of "dangerous machinery" properly refused.* In an action to recover for the death of plaintiff's intestate as a result of injuries sustained while "doping" an unguarded pulley belt while it was in motion, instruction attempting to define the meaning of "dangerous machinery," as used in the law, and also calling the attention of the jury to the question of deceased's having worked around the machinery for five years, is erroneous and is properly refused.

20. INSTRUCTIONS, § 81*—*when instruction emphasizing facts properly refused.* An instruction calling attention to particular facts is erroneous, and is properly refused.

Appeal from the Circuit Court of Randolph county; the Hon. W. E. HADLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. Rehearing denied April 5, 1916.

LASHLEY, BOLLINGER & HOBNER, for appellant.

A. E. CRISLER and A. D. RIESS, for appellee.

MR. JUSTICE BOGGS delivered the opinion of the court.

This case was before this court at its March Term, 1914, and is reported in volume 188 Appellate Reports at page 381. On the former hearing, said cause was reversed and remanded on the ground that the trial court erred in taking the case from the jury and entering judgment against appellee for costs.

On the subsequent trial a verdict for \$6,000 was returned by the jury and judgment rendered thereon, from which judgment this appeal is prosecuted.

The opinion rendered on the former hearing contains a pretty complete statement of the facts in con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

nection with said injury and they need not be restated at length. At the former hearing in this court, one of the principal contentions urged by appellant why appellee should not recover in this suit was because it was claimed that appellee was acting as superintendent of appellant's mill at the time of his injury, and that therefore under the law, it was his duty as such superintendent to see that the machinery in question was properly guarded; and that his failure to do so would bar his administrator from a recovery for his death.

This question was gone into fully on the hearing at that time and our views on this question are fully set out in the opinion. We there said: "It is said by counsel for defendant that the cost of repairing or placing of guards over these pulleys would be but a trifle and that the deceased could easily have placed such guards, and that by his failure so to do he became liable for a penalty. We do not believe that a person in charge of the machinery, taking care of it, as the deceased was, would incur a penalty for failure to install machinery that he had not been directed by the master to place therein when the master was actively participating in and managing the business of the going concern. This duty primarily rested upon Becker. The theory that the plaintiff cannot recover because of his failure or neglect to place the guards upon the machinery must be based upon the principle that although he may have been an employee, as he certainly was, he was guilty of negligence and assumed the risk of working with the machinery without guards. But, if this were true, it would not excuse the defendant from doing what the law requires of him, and the penalty imposed upon the defendant is to withdraw from it the defense of contributory negligence and assumed risk. The Supreme Court of this State seems to construe this act the same as the Mining Act, for it says, in the case of *Streeter v. Western Wheeled Scraper Co.*, 254

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Ill. 257, 1 N. C. C. A. 828: 'For many years we have held, in the construction of the Mining Act, that neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by a wilful violation of the provisions of that act. *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174. * * * This law was passed to protect employees, and in view of the construction given to the Mining Act in regard to the assumption of risk, the General Assembly must have supposed that the same construction would be given to this act in that regard.' Waiving the question as to the effect that the neglect of the deceased to place guards upon these pulleys would have upon the right of action for his injury, and the limiting of the right of defense of the defendant, yet the evidence shows he was receiving wages and not only looking after the machinery but was performing work, and performed such work as required him to pass near these pulleys, and there was at least evidence tending to show that he was an employee, and the evidence was not of that character that would warrant a court in saying that as a matter of law he was such a superintendent as would deprive him of the benefits of the statute. We think the case should have been submitted to the jury." This question is now sought to be reopened by appellant through its instructions, but we do not deem it necessary to again go into this question as we believe it to be one of fact for the jury under the instructions of the court.

Appellant also urges as ground for the reversal of said judgment, first, that "doping" the belts in order to keep them from slipping was, under the provision of the statute, the making of repairs, and that it was the duty of appellee's intestate to stop the machinery for said purpose; second, that the guards suggested by plaintiff's witnesses would not protect employees passing or working near the dangerous machinery; in other words, that they were not such guards as the statute contemplated.

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First: The first section of the act entitled "An Act to provide for the health, safety and comfort of employees in factories, mercantile establishments, mills, and workshops in this State," passed by the Legislature in 1909, provides among other things that "All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employee is obliged to pass, or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded. No machine in any factory, mercantile establishment, mill or workshop, shall be used when the same is known to be dangerously defective, and no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion." (J. & A. ¶ 5386.)

It is urged by appellant that the provision "no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion" would apply to the "doping" of the belt as was testified to in this case; that when the deceased, Victor Hahn, was doping the belt he was repairing the machine, and was therefore violating the statute above referred to which prohibits making repairs when the machine is in motion.

We do not believe that such things as oiling machinery, or doping belts to prevent their slipping, has ever been called or classified as repairs by mechanists. The definition given by Webster for the word "repair" is: "To restore to a sound or good state after decay, injury, dilapidation or partial destruction." We think it must be held that the Legislature in using the word "repair" gave to it its ordinary meaning.

Second: It is contended by appellant that under the provisions of the Statute of 1909 (J. & A. ¶ 5386), requiring "All dangerous places in or about mercantile establishments, factories, mills or workshops, near to which any employee is obliged to pass, or to be employed shall, where practicable, be properly inclosed, fenced or otherwise guarded," requires that machinery,

of the character of the "Nordyke roll" and "Allis roll" in appellant's mill shall be entirely inclosed.

It was urged by appellant that if the machinery were inclosed that then before the belts mentioned could be doped, it would be necessary to remove the covering from the machinery, and that if this were done appellant would not be required to otherwise guard the machinery. In other words, it is urged by appellant that the machinery in question should be entirely covered, and that before the belts could be "doped" this covering must be removed, and, when removed, the machinery would be in the same condition it was in at the time appellee's intestate was injured.

It is, therefore, argued that it cannot be said that the failure to guard or protect the machinery in question was the proximate cause of the injury to appellee's intestate. Appellant also contends that in the practical operation of said machinery, said machinery should be stopped when the "dope" is to be applied.

On the other hand, appellee contends that in order for the practical operation of appellant's mill, it was necessary that the "dope" should be applied to the belts to keep them from slipping while in motion; that to require the machinery to be stopped every time the "dope" was applied would greatly retard the operation of the mill.

Appellee also contends that it is practicable to fence or guard the machinery in question in such a manner as to allow the doping of the belts while in motion with the danger to the person so applying said dope greatly reduced. The evidence offered by appellee tends to prove that the machinery in question could be so guarded, fenced or protected as to allow the doping of the belts in question with a minimum of danger to the person applying the "dope." We are inclined to hold that under the evidence in this case it was a question of fact for the jury under the instructions of the court to say whether in the practical operation of the machinery of appellant it was necessary to stop the

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machinery before applying the dope in question. If it should be held that the machinery should not be so stopped, in its practical operation, then it follows as a legal conclusion under the statute that the machinery should be so guarded or fenced as "to offer the least possible chance for injury to those operating it." (Paragraph 1, sec. 31, of act above cited [J. & A. ¶ 5416].)

It should also be borne in mind that as the machinery was in fact operated by appellant, it was one of the duties of appellee's intestate to apply the "dope" to the belts when the machine was in motion, and we do not believe that appellant should now be allowed to say that appellee's intestate should have stopped the machinery before so applying the same.

Appellant objects to certain of the instructions given by the trial court on behalf of appellees. However, in its argument it practically admits that there is no serious error in these instructions under the holding of this court on the former hearing of this cause. We have examined the instructions offered on behalf of appellee, and find no serious objection to them, as we think they present the law fairly to the jury in keeping with our former holding in this case, and in keeping with what we have said in this opinion.

Appellant offered on the trial thirteen instructions, all of which were refused by the trial court, and for the refusal of which appellant assigns error. Instructions one, two, three, six, seven, eleven and twelve presented appellant's theory of the case and the law governing the same. But each of these instructions appellant, in effect, concedes do not state correct principles of the law if the former holding of this court is correct. It is, therefore, unnecessary to give these instructions any further notice, as none of them, in our judgment, correctly state the law governing this case as it was laid down in our former opinion.

The fourth instruction informs the jury as a matter of law that if appellee's intestate was the head miller

or superintendent of the mill that then he could not recover, which would be squarely against our former holding in this case.

Appellant's fifth instruction presents the question to the jury of assumed risk, which was clearly erroneous, as under the law governing this character of case the doctrine of assumed risks has been eliminated.

Instruction No. 8 informs the jury that if they believe from the evidence that the guards mentioned would be insufficient to protect deceased from injuries he might receive while working around the machinery, "doping" the belts, etc., that then they should find the issues for the defendant. We believe there was no error in refusing this instruction, as it practically informed the jury that they must find for the defendant, unless the guards would furnish absolute protection to those working around the machinery.

Instruction No. 9 submits to the jury the question of delegated authority with reference to the guarding of the machinery by the appellant. We understand from the opinion in the *Stréeter v. Western Wheeled Scraper Co.* case, *supra*, this authority cannot be delegated. There was, therefore, no error in refusing this instruction.

Appellant's tenth instruction submits to the jury the question of the guarding or protecting of the machinery in question. This instruction would probably be good were it not for the fact that it, in effect, requires that the danger from the machinery must be entirely eliminated, without reference to the question of the practical operation of said machinery, and for this reason we do not believe that the refusal of this instruction was error.

Instruction No. 13 attempts to define what in law constitutes "dangerous machinery," and then calls the attention of the jury to the question of appellee's intestate having worked around said machinery for five years as evidence to show said machinery was not

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dangerous. There was no error in refusing this instruction.

Finding no reversible error in the record, the judgment of the trial court should be and is affirmed.

Affirmed.

Melchior Leipold, Appellant, v. Elbert Epler, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Edwards county; the Hon. WILLIAM H. GREEN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 1, 1915. Rehearing denied April 5, 1916.

Statement of the Case.

Action by Melchior Leipold, plaintiff, against Elbert Epler, defendant, in the Circuit Court of Edwards county, to recover on a contract contained in a deed whereby defendant was alleged to have assumed the payment of certain mortgages. From a judgment for defendant, plaintiff appeals.

It appeared that plaintiff was the owner of land situated near the Saline River in Saline county, Illinois, upon which there were three mortgages, one for the amount of \$4,000, one for \$3,000 and one for \$8,000, for which plaintiff was liable, either by having executed the notes secured by the mortgages, or by having assumed the payment thereof.

On May 17, 1913, plaintiff sold and conveyed the land to the defendant for a nominal consideration of \$25,550, and conveyed it to defendant by warranty deed. The deed making the conveyance contained the following statement: "The covenants of warranty in this deed contained are made subject to the mortgages

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on said land * * *; and the accumulated interest on each of the above, which the grantee herein assumes and agrees to pay.”

The sale of this land was effected by one Gould, a cousin of defendant. Defendant's testimony tended to show that Gould was acting as the agent of plaintiff in the consummation of this deal, and that he received a commission therefor, while the testimony of the plaintiff and Gould was that Gould did not at any time act as such agent. It further appeared that upon the first efforts of Gould to trade with defendant he was unable to consummate a deal, and that he thereupon entered into a partnership with defendant for the purpose of purchasing this land. The testimony showed that defendant reposed great confidence in Gould, both in his integrity and judgment, and after the arrangement was made defendant left the matter entirely to Gould, and did not even go to see the land. Gould represented that it was a fine piece of corn land; that four hundred acres of it was in a high state of cultivation; that three hundred acres had the stumps taken out; that it overflowed only in times of very high water; that there were no sloughs in it; that the Saline River ran into it just enough to drain it good; that the improvements were good; that it always grew good corn and was worth \$50 an acre; and that the plaintiff paid \$50 an acre for it. Gould closed the deal with plaintiff, but there was no evidence of any agreement having been made to assume the mortgages previous to the making of the deed, when plaintiff inserted therein the clause assuming said mortgages, and Gould then sent the deed to defendant who retained it and did not record it for the reason, as he said, that Gould was his partner and that his name was not in the deed as grantee. Gould then informed the defendant that a man named Turrentine desired to purchase the land, and that it could be traded to him for \$30,000 by tak-

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ing some property in Kansas City and other places, and that Gould said he knew the property and that it was good, and Gould also said to defendant: "The deed is made to you, I admit that, but I will have a half interest in the land and rather than make another deed, you go ahead and do it as it was and I expect to get part of the property you were trading for."

It further appeared that a deal between Gould and Turrentine was consummated upon the judgment of Gould, and on the next day after this deal had been closed and the deed made, the deed from plaintiff to defendant was recorded. It further appeared that the property taken from Turrentine was of no value, and that the property secured by plaintiff from defendant, in addition to the assuming of the said mortgages, was of the value of about \$4,800, and that the Saline county land was of an inferior quality, not in a good state of cultivation, and worth very much less than it had been represented.

It further appeared from the evidence that a year or so from the time of the making of the deed by plaintiff to defendant that some of the principal and interest became due upon the mortgages referred to in the deed, and were not paid by the defendant, so plaintiff proceeded to pay off one principal note and several interest notes, amounting in all to about \$2,780.

The declaration consisted of several special counts and the common counts, but each and all of them are based upon the foregoing clause assuming the mortgages as set forth in the deed made by the plaintiff to defendant.

Defendant filed the plea of general issue, to which he attached a notice of special matters in defense: First, denying that the deed containing such clause was ever accepted by him, or that he assumed and agreed to pay the mortgages; second, that the transaction through which the deed containing the clause was obtained and had been effected through the fraud

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and circumvention of Gould, as agent of the plaintiff, and that the deed was fraudulently made to defendant, and that because of the fraud connected with the sale the contract sued on was void; and third, that the defendant never did receive any consideration for assuming and agreeing to pay plaintiff's indebtedness in the declaration mentioned.

HOWARD P. FRENCH, E. B. GREEN and J. M. CAMPBELL, for appellant.

H. J. STRAWN, ALLEN E. WALKER and P. C. WALTERS, for appellee.

MR. JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 5*—*what constitutes collateral agreement.* A contract to assume an incumbrance on land purchased is not one of the essential parts of a deed of conveyance, and is in fact extraneous and collateral to it.

2. MORTGAGES, § 227*—*when grantee not bound by recital in deed to pay existing incumbrances.* A recital in a deed that the grantee assumes and agrees to pay existing incumbrances on the property conveyed is not, in and of itself, sufficient to fix the liability to pay without proof that such grantee assented to the clause recited.

3. ESTOPPEL, § 21*—*when grantee not estopped by recital of deed.* A grantee is not estopped by the recital of a deed which he does not execute.

4. DEEDS, § 29*—*when undertaking in deed not enforceable.* An undertaking by a grantee recited in a deed is collateral to it, and if the promise fail or be shown to have been the result of fraud or mistake, the undertaking will not be enforced.

5. MORTGAGES, § 228*—*when fraud defense to agreement to assume incumbrances.* Where there is a recital in a deed that the grantee assumes and agrees to pay certain mortgages on the property conveyed and the grantee discovers fraud in the transaction, he is not limited to recoupment or to returning the property and suing for a return of the consideration, but may make use of the fraud to defeat an action by the grantor for breach of the contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. **CONTRACTS, § 1***—*what constitutes simple contract.* An undertaking of a grantee recited in a deed to assume and pay incumbrances on the property purchased is a simple contract.

7. **CONTRACTS, § 7***—*when fraud a defense.* Fraud is a good defense to an action on a simple contract.

8. **VENDOR AND PURCHASER, § 35***—*when fraud fatal to title.* Fraud practiced by the party seeking the remedy upon him against whom it is sought, and not that which is the subject-matter of the action or claim, is fatal to his title.

9. **PRINCIPAL AND AGENT, § 155***—*when principal may not receive benefit of unauthorized act of agent.* A principal cannot receive the benefit of unauthorized acts of his agent which are in fact fraudulent.

10. **PRINCIPAL AND AGENT, § 131***—*when principal liable for benefits due to unauthorized acts of agent.* A principal who has actually received the benefit of money procured by the unauthorized acts of his agent will be liable in the amount he has received the benefit of.

11. **FRAUD, § 115***—*when evidence sufficient to sustain finding that agreement by grantee to assume mortgages was fraudulently procured.* In an action by a grantor to recover for breach of an agreement recited in a deed whereby the grantee assumed certain mortgages on the property conveyed, where the defense to the action was fraud and where the evidence was conflicting, evidence examined and *held* that a finding by the jury that the agreement was procured by a fraudulent scheme concocted by the grantor and his agent was not manifestly wrong.

12. **MORTGAGES, § 226***—*when evidence sufficient to sustain finding that grantee did not intentionally assent to agreement to assume incumbrances.* In an action by a grantor to recover for breach of an agreement recited in a deed whereby the grantee assumed certain mortgages on the property conveyed, evidence examined and *held* to warrant the jury in finding that defendant never knowingly and intentionally assented to the contract recited.

13. **FRAUD, § 133***—*when instructions on fraud as defense to contract not erroneous.* Instructions framed on the theory that the presence of actionable fraud inducing damage to any extent is a complete defense to an action on a simple contract are not erroneous.

14. **INSTRUCTIONS, § 118***—*when instruction on effect of fraudulent representations by agent of vendor in procuring agreement to assume incumbrances not erroneous.* In an action to recover for breach of an agreement recited in a deed whereby the grantee assumed certain mortgages on the property conveyed, where the defense was that the agreement was procured by a fraudulent scheme concocted by plaintiff and his agent, an instruction relative to the effect of the fraudulent representations of plaintiff's agent in pursuance of the scheme

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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is not erroneous although there is no direct evidence that plaintiff had anything to do with that portion of the scheme to which the representations related, if there is evidence that plaintiff and his agent were co-operating generally in the transaction by which plaintiff was defrauded.

Boges, J., dissenting.

E. L. Brown, Appellee, v. John L. Paraham Hat Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Pope county; the Hon. WARREN W. DUNCAN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 17, 1916.

Statement of the Case.

Action of attachment by E. L. Brown, plaintiff, against the John L. Paraham Hat Company, defendant, in the Circuit Court of Pope county, to recover for salary. From a judgment of \$93.75 for plaintiff, defendant appeals.

GEORGE B. BAKER, for appellant.

W. H. MOORE and CHARLES DURFEE, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 592*—*when motion for new trial prerequisite to review.* In a jury trial the errors relied on for reversal must be brought to the notice of the trial court by a motion for a new trial so that they may be there corrected.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Brown v. John L. Paraham Hat Co., 198 Ill. App. 623.

2. APPEAL AND ERROR, § 863*—*what does not constitute part of record.* Matters copied into the transcript by the clerk and not certified to by the judge are not part of the record on review.

3. APPEAL AND ERROR, § 592*—*what grounds for reversal considered.* No grounds of reversal other than those set out in the motion for a new trial will be considered in reviewing the judgment of the trial court.

4. APPEAL AND ERROR, § 800*—*when bill of exceptions must contain motion for new trial.* The only way in which the Appellate Court can properly learn whether or not the reasons for a motion for a new trial are set out in the motion is through the bill of exceptions.

5. APPEAL AND ERROR, § 1339*—*when presumed that trial court properly overruled motion for new trial.* Where the grounds on which a motion for a new trial is based do not appear in the bill of exceptions, it is to be presumed that the trial court properly overruled the motion.

6. APPEAL AND ERROR, § 1303*—*when presumed that evidence sufficient to support verdict and judgment.* Where the grounds of a motion for a new trial do not appear in the bill of exceptions, it must be presumed that the evidence is sufficient to support the verdict and judgment.

7. APPEAL AND ERROR, § 1313*—*when presumed that remarks of trial court did not affect verdict.* Where objection is made to remarks of the trial court alleged to be prejudicial, and such remarks do not appear in the bill of exceptions, it will be presumed that the remarks complained of did not affect the verdict.

8. MASTER AND SERVANT, § 84*—*when evidence sufficient to sustain verdict in action for salary.* In an action to recover for salary, where the evidence was conflicting, a verdict for plaintiff held sustained by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois for use of Edward Gobin, by Elizabeth Gobin, Appellee, v. Thomas May, Jr., et al., Appellants.

1. BONDS, § 11*—*what constitutes a statutory surety bond.* A statutory bond signed only by a nonresident surety is not a bond with security.

2. CLERKS OF COURTS, § 6*—*when order confers no authority to approve a nonresident surety on appeal bond.* The order of a judge of the Circuit Court fixing the amount of an appeal bond "with surety to be approved by the clerk of said court" is equivalent to an order authorizing the clerk to approve a surety resident in this State, or authorized by statute to become such surety, and confers no authority to approve a nonresident surety.

3. CLERKS OF COURTS, § 6*—*what constitutes breach of official duty by Circuit Court clerk.* The action of a clerk of the Circuit Court in approving an appeal bond signed only by a nonresident surety is a breach of official duty, although the order of the judge fixing the amount of the bond provided that it should be "with surety to be approved by the clerk of said court."

4. CLERKS OF COURTS, § 6*—*what is nature of duty of clerk of Circuit Court in approving surety on appeal bond.* The duty of a clerk of the Circuit Court in approving the surety on an appeal bond is ministerial, although in performing such duty the clerk may be required to ascertain whether the proposed surety is a resident of this State.

5. VENUE, § 21*—*when verification of petition for change of venue insufficient.* A petition for a change of venue signed by several defendants but verified by but one of them is insufficient under section 3 of the Venue Act (J. & A. ¶ 11,489), requiring that every such petition "shall be verified by the affidavit of the applicant."

6. PLEADING, § 45*—*when addition of different causes of action does not affect declaration.* The fact that other and different causes of action may have been added to a declaration will not disturb any good and sufficient cause of action originally stated and adhered to and not abandoned.

7. LIMITATION OF ACTIONS, § 20*—*when action against Circuit Court clerk for negligence in approving surety on appeal bond accrues.* An action against a clerk of the Circuit Court for negligently approving an improper surety on an appeal bond accrues when the judgment of the Appellate Court affirming the judgment appealed from is made final.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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8. COURTS, § 79*—*when Appellate Court may not consider jurisdiction of Supreme Court on review.* The question whether the Supreme Court has jurisdiction to review on certiorari a judgment of the Appellate Court is not a proper matter of consideration for the latter court.

9. EVIDENCE, § 241*—*when copies of bonds of Circuit Court clerks deposited with Secretary of State admissible.* Section 7 of the Secretary of State Act (J. & A. ¶ 10,541), providing that "copies of all bonds, papers, writings and documents, legally deposited in the office of the Governor or Secretary of State, when certified by the Secretary of State and authenticated by the seal of his office, shall be received in evidence in the same manner and with like effect as the original," is broad enough to permit copies of bonds of Circuit Court clerks deposited with the Secretary of State to be received in evidence the same as the original when authenticated by the seal of the office of the secretary.

10. EVIDENCE, § 241*—*what is basis for rule for admission of authenticated copies of bonds filed with Secretary of State.* One of the objects of section 7 of the Secretary of State Act (J. & A. ¶ 10,541), providing for the admission in evidence of authenticated copies of bonds deposited with the Governor or Secretary of State with like effect as the originals, is to safeguard the bonds by keeping them on file in the office of the secretary and to obviate the necessity of removing them to be used as evidence upon the trial of cases whereby they might become lost or misplaced.

11. JUDGMENT, § 170*—*when not reversed for informalities.* A judgment will not be reversed for informalities not essential to its validity if it contains all the necessary elements of a valid judgment.

12. PROCESS, § 86*—*when amendment of summons may be made.* The amendment of a summons by increasing the amount of the *ad damnum* is of form and not of substance and may be made at any time, even after verdict.

13. APPEAL AND ERROR, § 1575*—*when rendition of judgment for amount greater than ad damnum stated in summons harmless error.* A judgment will not be reversed because it is for an amount greater than the *ad damnum* stated in the summons where at the time of filing the summons the amount of the *ad damnum* was sufficient to cover plaintiff's claim as it then stood, the excess being interest accruing in the meantime, and where the fact was not called to the attention of the trial court, it being presumed that the trial court would readily have granted an amendment to cure the defect.

Appeal from the City Court of East St. Louis; the Hon. WILLIAM

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. May, 198 Ill. App. 625.

M. VANDEVENTER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 17, 1916.

CHARLES P. WISE and FRED B. MERRILLS, for appellants.

C. H. BURTON, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

This case, which in different phases, has been twice in this court before, arises out of the following facts and circumstances: On November 4, 1890, Edward Gobin, a child between five and six years of age, was injured by an engine of the Louisville, Evansville & St. Louis Consolidated Railroad Company in East St. Louis. On June 1, 1893, he obtained a judgment against said railroad company for \$3,000. An appeal was prayed from this judgment to the Appellate Court and the bond was fixed by the court at \$3,500 with "surety to be approved by the clerk of said court." Thomas May, Jr., was clerk of the court and approved the bond with D. J. Mackey, the president of the railroad referred to, and a nonresident of Illinois, as sole surety. Appellee's judgment was affirmed against the railroad by the Appellate Court on March 23, 1894. [See 52 Ill. App. 565.] During the pendency of the appeal, the railroad company became insolvent and went into the hands of receivers. A petition was filed for Edward Gobin in the United States court in an attempt to have the judgment paid out of the property of the railroad company in the hands of the receivers but the same was denied and the petition dismissed. On February 22, 1897, judgment was obtained against said D. J. Mackey as surety on the appeal bond at his place of residence, Evansville, Indiana, and execution was afterwards issued thereon and returned unsatisfied, there being "no property found" upon which levy

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could be made. On November 20, 1900, suit was commenced against said Thomas May, Jr. and Thomas Burke, Joseph A. Kurrus and Albert M. Meints, the bondsmen, on his official bond as clerk of the Circuit Court, by appellee, to recover damages for the failure of duty by the clerk in approving the bond. That suit was dismissed February 7, 1903. On February 12, 1904, this suit was begun between the same parties as the one last referred to and for the same purpose, in the City Court of East St. Louis. A demurrer was filed to the declaration and sustained. An amended declaration was then filed to which a demurrer was also sustained. Appellee elected to abide the declaration and judgment was entered against him for costs. On appeal to this court it was held that the declaration stated a cause of action and the judgment of the trial court was reversed and the cause remanded. *People for use of Gobin v. May*, 133 Ill. App. 139. The declaration to which the demurrer had been sustained contained three counts, which are recited at some length in the opinion. This court there held that the demurrer was properly sustained as to the first count but should have been overruled as to the second and third. The second count above referred to had alleged that the clerk took Mackey, who was a nonresident of the State and wholly insolvent, as sole surety without requiring him to qualify as surety and in utter disregard of his duties as clerk, and the third count was substantially the same, but alleged that the clerk well knowing that Mackey was insolvent and a nonresident of the State of Illinois and not a suitable or sufficient surety took him as sole surety on said appeal bond. After the case was redocketed in the City Court, appellee withdrew the second and third counts and filed an amended declaration containing only one count. A demurrer was again sustained to this declaration, appellee abided by the declaration and judgment was entered against him for costs and in bar of his action.

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Appellee again appealed his case to this court which affirmed the judgment of the court below, holding the one count to be identical with the first count of the former declaration, which had not been approved. *People for use of Gobin v. May*, 158 Ill. App. 596. Thereafter, the Supreme Court on petition of appellee granted a writ of certiorari, reviewed the case, reversed the judgment of the Appellate and City Courts and remanded the case. *People v. May*, 251 Ill. 54. That court in its opinion states: "The single count of the amended declaration did not aver that the surety, at the time he was accepted, was insolvent or had not property of such value that he could be compelled to respond to the amount of the bond, but the averment is that the clerk did not make due inquiry and use proper means to ascertain the qualification and financial standing of the surety and to ascertain the amount of his property, and that without properly informing himself he 'carelessly and negligently accepted the said D. J. Mackey, a nonresident of the State of Illinois, as aforesaid, and wholly insufficient as surety upon said appeal bond, as sole surety thereon.' The insufficiency of the surety therefore seems to be based, not upon his want of property, but upon his nonresidence." It was there also held that: "So far as the courts of this State are concerned, a bond signed only by a nonresident surety is not a bond with security. The order of the court to the clerk to approve the security offered on the bond was equivalent to an order authorizing the clerk to approve a surety resident in this State or authorized by statute to be a surety upon such bond. The order conferred no authority upon the clerk to approve a nonresident surety, and his act in doing so was a breach of his official duty. * * *

The question committed to the judgment of the clerk was the sufficiency of the security. The law, as we have held, required the surety to be a resident of the State. As to this requirement there was no discretion.

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The duty of the clerk was fixed and certain, and was therefore ministerial. * * * The fact that the clerk may be required to ascertain whether the proposed surety is a resident of the State does not affect the ministerial nature of his duty.”

After the case was redocketed in the City Court it came to trial on the amended declaration filed October 19, 1914. In this declaration the breach of duty relied on is the same as in the first count of the first declaration demurred to and the only count reviewed by the Supreme Court, that is to say, that the clerk unlawfully and in disregard of his duty approved said appeal bond with D. J. Mackey, a nonresident, as the sole surety. During the course of the litigation and prior to the last trial, Thomas Burke, one of the bondsmen, died and Albert Meints, another bondsman, became bankrupt and received his discharge. The jury found the issues for appellee and that the amount of the bond and debt was \$10,000. They further found the amount of damages sustained by appellee against the appellants Thomas May, Jr. and Joseph A. Kurrus to be \$6,269.58.

Appellants complain that a petition for a change of venue filed by them was not granted. The petition asked for a change of venue pursuant to the statute, on account of the prejudice of William M. Vandeventer and Robert H. Flannigan, judges of the City Court. The petition was signed by appellants, Thomas May, Jr. and Joseph A. Kurrus, also the bondsman Albert M. Meints, by Fred B. Merrills, their attorney, shortly prior to the discharge of the last-named bondsman in bankruptcy. It purports to have been made by Thomas May, Jr. on behalf of himself and his codefendants Kurrus and Meints and is sworn to by May alone. It does not state that it is made at the request of Kurrus and Meints or with their knowledge or consent. Section 3 of the Venue Act (J. & A. ¶ 11,489) provides: “Every application for a change of venue shall be by

petition, setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the applicant.”

In *Eddleman v. Union County Traction Co.*, 217 Ill. 409, which was a condemnation proceeding, it was held that a petition for a change of venue upon the alleged ground that the judge was prejudiced was properly denied, where only a part of the defendants joined in the petition and the same was not sworn to by one of two defendants who signed it. In *Gourley v. Pierce*, 182 Ill. App. 609, it was held in a bill to contest a will that an application for a change of venue by one complainant when not joined in or consented to by the other complainants was properly denied. In *Tanner v. Clapp*, 139 Ill. App. 353, which was a suit in assumpsit, a petition for a change of venue, which stated that the application was made with the consent and on behalf of all the defendants, but which was signed and verified by the defendant only, was held to be insufficient. In view of these authorities, we are of opinion that the court properly refused the petition for a change of venue from the judges of the City Court in this case.

It is earnestly insisted by appellants that this suit was barred by the statute of limitations. The suit which is now pending on this appeal was commenced February 12, 1904, and the judgment of the Circuit Court of St. Clair county, from which the appeal in the original damage suit was taken, was affirmed in the Appellate Court, and made final March 23, 1894. We are of opinion that the cause of action accrued against appellees on the official bond of Mr. May as clerk of the Circuit Court on the date of the affirmance of such judgment. Ten years had not elapsed between the date of the affirmance of the judgment and the commencement of this suit, and unless the original cause of action has been replaced by another and different cause since the commencement of the suit, the statute

of limitations has not run. While other and different causes may have been added to the declaration, this would not disturb any good and sufficient cause originally stated and not abandoned but still adhered to. On the first appeal from the original declaration, this court passed upon the sufficiency of the three counts, holding the first count bad and the other two good. On the second appeal we held that the single count there considered was identical with the first count in the declaration on the former appeal, which we had held bad, and the Supreme Court in its opinion in this case above referred to, states in reviewing the declaration: "The insufficiency of the surety, therefore, seems to be based not upon his want of property but his non-residence." In the declaration as it now stands on this appeal, it is charged that the said clerk unlawfully and in utter disregard of his duty did approve said Mackey as sole surety upon said bond and that said Mackey was then a nonresident of the State of Illinois. It is apparent therefore from the pleadings that the approval by the clerk, of Mackey, who was a non-resident of the State of Illinois, as sole surety on the bond, was charged in each of the declarations and this charge the Supreme Court holds was a good cause of action. Appellants contend, however, that as the bond was approved June 1, 1893, the cause of action then accrued, the statute of limitations then began to run, and as a consequence the ten-year limitation had expired before this action was commenced. But it must be borne in mind that this suit is for damages occasioned to appellee by the unlawful act of the clerk in approving the appeal bond. Had appellee lost his suit on appeal, he would not have been injured and could not have sustained an action notwithstanding the fact that the act of the clerk in approving the bond was illegal, but it was not until he obtained his final judgment that his rights became fixed and his right of action accrued. If it could properly be held that the

right of action in such a case accrues when the bond is approved, then it might also happen that an appellee's rights would not be fully determined until after the expiration of ten years from the illegal approval of the appeal bond, under which circumstances such an appellee would have no right to bring suit against the clerk for his illegal action, and the purpose for which such bond is required by law would be defeated. We conclude that it must, therefore, be held in reason that appellee's right of action accrued when his judgment was made final, which was March 23, 1894, and that the statute of limitations did not run against this suit.

Appellant calls in question the right of the Supreme Court to review this case when it was before that body, because as it is claimed the court did not have jurisdiction. Whether or not that court had jurisdiction of the case on certiorari is not a proper matter of consideration for this court, but, if it were, it only need be said in answer to this claim that on a motion filed in the Supreme Court, asking that the final order in this case be recalled, the judgment vacated and the opinion above referred to (251 Ill. 54) be expunged from the record and the remanding order recalled. The court denied the motion, holding that the case was one of which the court had jurisdiction of the subject-matter and that its judgment was final between the parties in this case. Over appellants' objection, appellee was permitted to introduce in evidence a copy of the bond sued on, certified to by the Secretary of State. Appellants insist that the failure to introduce the bond itself leaves nothing on which to base the judgment, as the copy was insufficient. Section 4 of chapter 25 of our Revised Statutes (J. & A. ¶ 2129) requires that the bond of a clerk of the Circuit Court shall be filed in the office of the Secretary of State. It is provided by section 7, ch. 124, of our Revised Statutes (J. & A. ¶ 10,541) that: "Copies of all bonds, papers, writings and documents, legally deposited

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in the office of the Governor or Secretary of State, when certified by the Secretary of State and authenticated by the seal of his office, shall be received in evidence in the same manner and with like effect as the originals." It appears to us that this section is sufficiently broad to permit copies of bonds of circuit clerks deposited with the Secretary of State to be received in evidence the same as the original when authenticated by the seal of the office of the secretary. This is the plain language of the statute, and we know of no reason why it should be departed from. Counsel for appellants state that appellee could easily have brought the Secretary of State or one of his deputies with the original instrument to be introduced on the trial. It is evident, however, that one of the objects of the law is to safeguard these bonds by keeping them on file in the office of the Secretary of State, and to obviate the necessity of removing them to be used as evidence upon the trial of cases and thereby possibly become lost or misplaced. The court below properly permitted the duly certified copy of the bond in question to be introduced in evidence and, when so introduced, it was properly received with like effect as if it had been the original.

Complaint is made by appellants of the form of the judgment entered in this cause which is as follows: "It is therefore considered and adjudged by the court that the plaintiff have and recover of defendants Thomas May, Jr. and Joseph Kurrus the said sum of six thousand two hundred sixty nine dollars and fifty eight cents (\$6,269.58), together with the costs by him in this behalf expended, and that execution issue therefor." While it would have been proper for the court to have followed more in detail the form of the verdict above referred to, yet this judgment shows the relief granted, in whose favor and against whom, the amount of the judgment and that it was rendered by the court. It therefore contains all the necessary elements for a valid judgment and should not be reversed for infor-

malities not essential to its validity. *Coats v. Barrett*, 49 Ill. App. 275; *Minkhart v. Hankler*, 19 Ill. 47.

Complaint is also made by appellants of the ruling of the court in regard to the instructions. The instructions given for appellee were not intricate or involved, and appear to state plainly the law in harmony with the holding of the Supreme Court in its opinion in regard to this case above referred to, while the instructions refused on the part of appellants either transgressed the law as there stated or were not in conformity with other rules of law, most of which have been heretofore discussed in this opinion. It is a contention that improper remarks prejudicial to appellants were made by the court in the course of the trial and that counsel for appellee made improper and unfair arguments to the jury, not supported by the evidence. A considerable portion of the briefs of both appellants and appellee are devoted to this question, but a consideration of all the statements referred to leads us to the conclusion that while hasty remarks may have been made by the court and counsel in the course of the trial, there was nothing said that could have prejudiced the jury in the finding of their verdict or could warrant the granting of a new trial on that account.

One of the reasons for a new trial assigned in the motion by appellants in the trial court was that the damages assessed by the jury exceeded the *ad damnum*. The writ of summons issued stated the debt under the bond at \$10,000, and claimed damages in the sum of \$5,000. The declaration upon which the case was tried placed the damages at \$10,000. It is claimed by appellants with considerable force that the fixing of the larger amount in the declaration is not sufficient but that in order to save the judgment the summons should have been amended. The statement in the motion for a new trial was, "The damages assessed by the jury exceed the *ad damnum*." Whether or not

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this was intended to refer to the *ad damnum* of the declaration or of the summons does not appear. As a matter of fact at the time the summons was filed the damages laid would have been sufficient to cover the judgment obtained by appellee for his injuries, together with interest thereon to that date, but the excess over the amount stated in the summons was caused by the accumulation of interest up to the time of judgment in this case. If the attention of the court below had been called to the fact that the judgment exceeded the amount of damages stated in the summons, it must be presumed that an amendment would have been readily granted as such an amendment is one of form rather than substance and could have been made on the moment, even after verdict. In view of the fact that the declaration upon which the case was tried stated a sufficient amount in the *ad damnum* to more than cover the amount of the recovery, and as the objection does not go to any matter of substance but to a mere formality so far as this case is concerned, we are of opinion that the failure to amend the summons in the particular named should not work a reversal of the judgment. In accordance with the views above expressed, the judgment of the court below will be affirmed.

Affirmed.

Schulz v. Kaiser, 198 Ill. App. 637.

Jacob Schulz, Appellant, v. William Kaiser, Appellee.**(Not to be reported in full.)**

Appeal from the Circuit Court of St. Clair county; the Hon. W. E. HADLEY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 17, 1916.

Statement of the Case.

Action by Jacob Schulz, plaintiff, against William Kaiser, defendant, in the Circuit Court of St. Clair county, to recover for injury to crops by trespassing animals. From a judgment for defendant, plaintiff appeals.

OTWELL & LINDAUER, for appellant.

A. B. DAVIS, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. ANIMALS, § 48*—*when instruction on damages for trespass erroneous.* In an action to recover for damage done to crops by trespassing animals, an instruction that the jury should find for defendant if it appeared that no actual damage was sustained by plaintiff although it should appear that defendant's animals actually entered upon plaintiff's land is erroneous, plaintiff being entitled to at least nominal damages in such case.

2. ANIMALS, § 23*—*what constitutes trespass by.* Every unauthorized entry upon the land of another by animals is a trespass.

3. ANIMALS, § 46*—*when damages implied from trespass by.* Damages are implied from every unauthorized entry upon the land of another by animals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Parker v. Conover, 198 Ill. App. 638.

Valmore Parker et al., Appellees, v. Dolph Conover et al., Appellants.

1. WILLS, § 228*—*when complete instrument overrides particular provisions.* As a general rule no section or provision of a will can control against the manifest intent of the complete instrument.

2. WILLS, § 226*—*when construction depends upon intention of testator gathered from entire instrument.* The construction of a will depends upon the intention of the testator to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance or some portion of it is absolutely unintelligible.

3. WILLS, § 244*—*who constitute heirs and descendents living at time of distribution of estate.* A provision in a will that a certain distribution of the profits arising from his property be made among his "heirs and descendents living" at the time of the distribution means a distribution between the heirs who are directly descended from him who are living at such time, and does not include the husband and executor of a deceased daughter, although in another clause of the will the testator devises to such daughter an undivided portion of his estate without condition.

4. WILLS, § 249*—*when general provision in favor of child controlled by specific provision for distribution.* Where testator made in his will a life provision for his wife and devised without condition an undivided portion of the estate, subject to the provision for the wife, to a daughter, who predeceased the testator, leaving a husband, who was her devisee and executor, but no children, and in a later clause of the will testator provided that under certain conditions a distribution of certain royalties derived from the estate devised might be made in the lifetime of the wife, and that any distribution made previous to the death of the said wife should be between his heirs and descendents living in pursuance of the statute of the State of Illinois at the date of this will, *held* that the general provision in favor of the daughter was controlled by the specific provision as to the distribution, so that the devisee and executor of the deceased daughter had no interest or distributive share in such distribution.

5. WILLS, § 249*—*when general provisions controlled by specific provisions.* In constructing wills, general provisions must give way to those which are specific.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Parker v. Conover, 198 Ill. App. 638.

Appeal from the Circuit Court of Crawford county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 17, 1916.

P. G. BRADBURY and JONES & JONES, for appellants.

NEWLIN, PARKER & NEWLIN, for appellees.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Appellees, who are the widow, heirs at law and the executors of Henry Parker, deceased, filed this bill to construe his will. There was no evidence in the case but it was by agreement heard upon bill and answer, the only question before the court being as to the intention of the testator as expressed in certain portions of the will. It appeared from the bill and answer that Henry Parker died January 26, 1909, in Crawford county, Illinois, where he owned a large body of land, underlaid with gas and oil; that at the time of his death he had a wife, six children and three grandchildren; that his will was duly admitted to probate and his sons Valmore Parker and G. H. Parker, who were appointed executors therein, duly qualified and entered upon the discharge of their duties. Item three of the will, after giving to the testator's wife, in lieu of dower and homestead estate, all of his household goods and any other personal property that she might select, contained the following provision: "I also give and bequeath to my said wife for and during her natural life, the proceeds, rents, issues and profits, including the oil and gas therein and thereunder, of all the real estate of which I may die seized, together with the interest and income that may be derived from any and all personal property, moneys or choses in action of which I may die possessed and the accumulation of my estate after my death; provided, however, all of said proceeds, rents, issues, profits, interest and income

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will be needed for the maintenance, comfort and support of the said Mary Parker and her household." In item four, the testator devises and bequeaths to his executors in trust all of his property except that bequeathed to his wife, Mary Parker, to hold, use, manage and control the same, during the lifetime of his said wife; that said executors sell said personal property coming to their hands and that the proceeds of the sale, together with all money belonging to the estate or that may accumulate in the hands of the executors, be loaned during the lifetime of his said wife, provided they should supply the comforts, necessities and demands of his said wife, and also provided that if at any time the accumulations and income of the estate should be such as, in the judgment of the executors, the whole of the same should not be needed for the support and maintenance of his wife in a comfortable manner they might make distribution of the money which might accumulate as afterwards in the will directed. The will then devises certain portions of the real estate to the testator's children and grandchildren, "subject, however, to the bequests and devises herein before made for the use and benefit of my said wife, Mary Parker therein." By item twelve the testator devised to his children, Valmore Parker, Ella Adams, George H. Parker, Albert Parker, Millie Conover and Stella Conover, each the one-seventh part of all the oil, gas and mineral, in and under the real estate of which he might die seized, share and share alike, subject to the devises made for the use and benefit of his said wife; and by the thirteenth item, he in like manner devised to his three grandchildren, each the one-twenty-first part of such oil, gas and mineral. Item fourteen of the will provided that: "After the death of my said wife and the payment of the expenses of her last illness and the funeral expenses out of any money belonging to my estate which payments I hereby authorize and direct shall be made the same as any other debt against

my estate. I desire that all the personal property of which I may die possessed, shall be by my executors immediately converted into money without any order or decree of court at either public or private sale as they may deem for the best interests of my estate; that they also with all convenient speed collect all moneys, including all interest due my estate and after paying all the costs and expenses, all debts and bequests that said executors pay to and distribute between my heirs and descendents living at the death of my said wife, if she survives me, all the rest, residue, remainder, of said money and accumulations not theretofore distributed, in pursuance of the statute of the State of Illinois in force at the date of this will, and any distribution made by my executors previous to the death of my said wife shall be made between my heirs and descendents living in pursuance of the statute of the State of Illinois at the date of this will."

The bill states that the executors have, pursuant to the terms and conditions of said will, sold the royalties and interest from all oil produced and saved from the lands of which said testator died seized, and that they have found the whole amount of the proceeds of such royalties were not needed for the support and maintenance of the widow; that they have heretofore made distribution of the portions of the money derived from the sale of said oil in excess of the amounts necessary for her support and maintenance, which said moneys have been distributed among the persons entitled thereto, in accordance with their respective interests, and which distribution continued from time to time until the death of Millie Conover, one of the children and heirs at law of said Henry Parker and a beneficiary named in said will; that said Millie Conover died May 30, 1914, testate, leaving her mother, the said Mary Parker, her sisters, Ella Adams and Stella Conover, her brothers, Valmore Parker, G. H. Parker and Albert Parker, and her nieces, Minnie Millins, Lillie

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McMasters, Lillie Garrett, her only heirs at law her surviving; that by her last will and testament, her surviving husband, Dolph Conover, was named as the sole legatee of the property of every kind and character, of which she died seized, and that said Dolph Conover was named as her executor, and has duly qualified and is now acting as such; that said executors now have money on hand derived from the proceeds of sale of oil royalties from the lands of said testator, which are not needed for the support, care and maintenance of his widow and which said executors insist should be distributed among the heirs, descendents and legatees of the said Henry Parker now living, and the said Dolph Conover claims that he is entitled to one-seventh part thereof, under the terms of the last will and testament of the said Millie Conover; that it is to settle this controversy that the suit is instituted to construe the will.

Dolph Conover and Dolph Conover as executor of the last will and testament of Millie Conover, deceased, were made parties defendant to the bill and filed an answer claiming the one-seventh portion of all the proceeds of oil, gas or minerals now held by said executors, which have been derived by them from any of the lands, of which the said Henry Parker died seized, or which may hereafter come to their hands from said source, under and by virtue of the last will and testament of said Millie Conover, deceased. The court found that by the terms and provisions of said last will and testament of said Henry Parker, deceased, all the money derived or collected by the executors from the sale of oil as royalties, or that may hereafter be collected by them during the lifetime of said Mary Parker, or so much thereof as will be needed for her maintenance, comfort and support, during her life, is the property of, owned by and belongs to the complainant Mary Parker, widow of said Henry Parker, and should be paid to her for and during her natural

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life, and if at any time said money should, in the judgment of said executors, not be required to be so used, then they might make distribution of such part of such money as is not so required for the use of said Mary Parker, to the heirs and descendants of said Henry Parker, deceased, living at the time of such distribution in such proportion or share as each heir would take by virtue of the statute in case of intestate property in force at the time of the death of said Henry Parker, deceased; that Dolph Conover and Dolph Conover executor of the last will and testament of Millie Conover, deceased, are neither heirs nor descendants of said Henry Parker, deceased, and never can be, and that neither of them is the owner of or has any interest in said money or any part thereof, heretofore collected or that may be hereafter collected, during the natural life of said Mary Parker. It was accordingly decreed by the court that said executors pay to the complainant Mary Parker, for and during her natural life, so much of said money as should be required for her maintenance, support and comfort and distribute the balance, if any, among and between the heirs and descendants of the said Henry Parker, living at the time of such distribution, pursuant to the statute of the State of Illinois, in force at the time of the death of said Henry Parker, and that in making such distribution they should not pay any part of said money so collected or derived from such sale of oil as royalty during the lifetime of complainant Mary Parker to said defendant Dolph Conover and Dolph Conover executor of the last will and testament of said Millie Conover, deceased, or either of them. Dolph Conover personally and as executor prosecutes this appeal, asking the court to hold that by operation of law the terms of the will must be construed as providing that one-seventh of the oil, gas and minerals under all the land became a vested remainder in his wife, Millie Conover, at the death of her father, subject only

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to a just proportion of the amount necessary to maintain, care for and support his widow, Mary Parker, during her lifetime; that the estate devised to said Millie Conover by the twelfth item above referred to, was a vested remainder subject to the life estate devised to Mary Parker therein.

In determining the rights of appellant to the fund in question, it is necessary to take into consideration the following items of the will: Item three of the will, which gives to the wife, Mary Parker, during her natural life "The proceeds, rents, issues and profits including the oil and gas therein and thereunder of all the real estate." Item four, which devises and bequeaths all the property to the executors in trust to hold, use, manage and control the same during the lifetime of the wife, Mary Parker, as therein directed; that the executors shall keep loaned the fund therein provided for during the life of the said wife and shall supply her comforts, wants, necessities and demands, and if at any time the accumulations and income be such as in the judgment of the executors the whole of the same is not needed for her support and maintenance in a comfortable manner, "they may make distribution of so much money which may accumulate as hereinafter directed." Item twelve, which devises to the six children including Millie Conover, the deceased wife of appellant, each a one-seventh of all the oil, gas and mineral under the real estate, subject to the devises and bequests made for the use and benefit of the wife, Mary Parker. That part of item fourteen which provides that "any distribution made by my executors previous to the death of my said wife shall be made between my heirs and descendents living, in pursuance of the statute of the State of Illinois at the date of this will." And with these items there should also be considered the specific devises of real estate made to the children and grandchildren as above referred to, subject to the devises and bequests made for the use and

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benefit of the wife of the testator. The widow, Mary Parker, was a complainant in the bill, asking that the accumulations in the hands of the executors be distributed to the heirs and descendents of her deceased husband, living at the time of the distribution and that none go to appellants. Appellant Conover makes his claim under that provision of section twelve of the will which gives his wife one-seventh part of all the oil, gas and mineral in and under the real estate of which her father should die seized, subject to the devises and bequests made for the use and benefit of his said wife therein, but it is a well-known canon of construction that in determining the intent of the testator the whole will must be considered together, and that as a general rule no section or provision standing alone can control against the manifest intent of the complete instrument, but if possible force and effect must be given to every request or direction contained therein. "The construction (of a will) depends upon the intention of the testator, to be ascertained from a full view of everything contained in the will, giving just weight and operation to each clause and word employed, unless there is some invincible repugnance, or some portion of it is absolutely unintelligible." *Dickison v. Dickison*, 138 Ill. 541.

The will in question shows a systematic attempt on the part of the testator to dispose of his property and provide for his family. His first thought is for his wife and he gives her all the income from the property, if necessary, for her maintenance, comfort and support, and provides that the personal property be sold if the income is not sufficient. He then considered the care of his property and the income therefrom, putting it in the hands of his executors as trustees with directions to pay so much of it to the widow as her needs and comfort might demand, the balance to be distributed as therein provided. He then divides his land among his children and grandchildren by seven specific

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bequests, each one of which concludes with the identical words used at the conclusion of the provision, under which appellant claims title, to wit: "Subject, however, to the devises and bequests herein made for the use and benefit of my said wife, Mary Parker." He then disposes of the oil, gas and mineral under the land subject to the same reservation. He subsequently directs what shall be done with his personal property and accumulations on hand at the death of his wife, and then comes the final provision in the will, concerning the disposition of the property which is, that any distribution thereof made previous to the death of his wife, should be made between his heirs and descendants living, in pursuance of the statute of the State of Illinois at the date of the will. The provisions of the will, taken as a whole, appear to be substantially harmonious and item twelve, under which appellant claims, when read with the rest of the will, does not appear to be in serious conflict therewith. By that item the testator's children, including Millie Conover, were each given one-seventh of all the oil, gas and mineral in and under the real estate, of which he should die seized. This devise, however, was made subject to the devises and bequests made for the use and benefit of the testator's wife. It must therefore be held to be subject to the provisions governing the distribution of the fund provided for the wife, which is named in other items. By those items the distribution made previous to the death of the wife were to be between the testator's living heirs and descendants. Appellant Conover was not a descendent of the testator and could not either in his own right or as executor be considered an heir of the testator. It appears evident to us that the testator meant that the fund distributed during the lifetime of his wife should be divided among his heirs who had directly descended from him, who were living at the time of the distribution. Under this construction appellant is not entitled to any interest

or distributive share in said fund which may be distributed during the lifetime of the widow of said Henry Parker, deceased, either in his own right, as devisee of his wife, or as the executor of her will.

It is also a matter to be considered that the bill asks that the fund be distributed as provided for under the specific direction contained in item fourteen, which is the last direction given by the testator in his will, concerning the disposition of his property. Even if this provision did conflict with that under which appellant claims, the provision in item fourteen must prevail because it is a fundamental rule in the construction of wills that the later provision must prevail over the former ones when the same cannot be harmonized. The rules of construction above referred to are set out at length, analyzed and supported by citations in the opinion of the court delivered through Justice Shope in *Dickison v. Dickison*, *supra*. Item twelve, which gave the testator's children each one-seventh of all the oil, gas and mineral in or under his real estate, was a general provision, disposing of the interests named, while that providing for the distribution of the fund at the end of item fourteen was a specific provision made for the purpose of disposing of accumulations or the receipt from royalties during the lifetime of his widow. "It is a familiar rule in the construction of wills that general provisions must give way to specific provisions." *Saeger v. Bode*, 181 Ill. 514. Under this rule, also, the specific provision contained in item fourteen must prevail, and under it appellants are not entitled to receive anything. We are of opinion that the chancellor in the court below properly construed the provisions of the will submitted to him by the bill and answer and that his decree should be affirmed.

Affirmed.

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